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# INTERNATIONAL LAW

*W. E. HALL*

**London**

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# INTERNATIONAL LAW

BY

WILLIAM EDWARD HALL, M.A.

BARRISTER - AT - LAW

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**NOTE.** Chapter IV of Part I and Chapters II–XI of Part IV of the following work are a reprint, with some additions and modifications of form, of a work on the ‘Rights and Duties of Neutrals,’ published by the author in 1874.

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## INTRODUCTORY CHAPTER.

INTERNATIONAL law consists in certain rules of conduct which modern civilised states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement. In what international law consists.

Two principal views may be held as to the nature and origin of these rules. They may be considered to be an imperfect attempt to give effect to an absolute right which is assumed to exist and to be capable of being discovered ; or they may be looked upon simply as a reflection of the moral development and the external life of the particular nations which are governed by them. Views held as to its nature and origin. According to the former view, a distinction is to be drawn between international right and international positive law ; the one being the logical application of the principles of right to international relations, and furnishing the rule by which states ought to be guided ; the other consisting in the concrete rules actually in use, and possessing authority so far only as they are not in disagreement with international right. According to the latter view, the existing rules are the sole standard of conduct or law of present authority ; and changes and improvements in those rules can only be effected through the same means by which they were originally formed, namely, by growth in harmony with changes in the sentiments and external conditions of the body of states. As between these two views in their crude form the majority of writers appear to hold to the former, but a considerable number, while thinking that positive inter-

national law derives its force from absolute right, practically refer to positive law as the only evidence of what is right, so that international usage and the facts of modern state life return by a bye road to the position which they occupy in the second view, and from which they appear at first sight to have been expelled.

Reasons for  
adopting  
the second  
of these  
views.

In the following work the second view is assumed to be correct. The reasons for this assumption are as follows:—

Putting aside all question as to whether an absolute right, applicable to human relations, exists, or whether if its existence be granted its dictates can be sufficiently ascertained, two objections, both of which seem to be fatal, may be urged against taking it as the basis of international law.

The first of these is that it is not agreed in what the absolute standard consists. With some it is the law of God, with others it is a law of nature inductively reached, by others it is erected metaphysically. Standards so different in origin necessarily differ in themselves, and it is scarcely too much to say that if the fundamental ideas of the more prominent systematic writers on international law were worked out without reference to that body of international usage which always insensibly exerts its wholesome influence whenever particular rules are under consideration, there would be almost as many distinct codes as there are writers of authority.<sup>1</sup> The difference of opinion thus shown is no doubt not greater than that which exists as to the principles by which the internal life of a state ought to be regulated, and

<sup>1</sup> The fundamental ideas of the writers who have exercised most influence upon other writers or upon general opinion, may be shortly stated as follows. Grotius based international law in the main upon a natural law imposed upon man by the requirements of his own nature, of which the cardinal quality, so far as the relation of one man to another is concerned, he supposed to be the social instinct. This natural law he regarded as existing independently of divine command (*De Jure Belli et Pacis*, Prolegomena and lib. i. cap. i). Pufendorf, by looking upon natural law as being imposed by a divine injunction, analogous apparently to the injunctions of religion, and as not being binding apart from such injunction, loosened the intimacy of its connection with human nature; and though he agreed with his

as to the origin and sanction of those principles. But the external conditions under which individuals and states live

predecessor in thinking that the social instinct at least is inherent in the human mind, he appears, in supposing it to have been given as a means of self-preservation, to elevate utility to the individual rather than right between man and man into its primary object (Law of Nature and Nations, bk. i. c. 2; bk. ii. c. 2, 3). In one important respect Grotius and Pufendorf were at one. Both considered that natural law not only forbids acts detrimental to the social state, but enjoins acts tending to its conservation, so that neglect to contribute to the maintenance of that state amounts to an infraction of law. Thomasius, on the other hand, narrows the sphere of law by reducing its injunctions to the negative maxim, 'Do not do to others what you do not wish them to do to you,' and relegates everything beyond this to the domain of morals, with respect to which no external obligation exists. It is unnecessary to point out what different international laws would be obtained by the logical application of the former and the latter of these theories respectively. According to Wolff, man is bound by the law of his nature to attain the highest perfection of which he is capable, and the obligation to perform an act being regarded as giving rise to the rights necessary for its performance, he is endowed with innate rights of liberty, equality, and security, which are necessary to his development. These innate rights others are bound in their turn to respect; their acknowledgment may therefore be compelled, and their infringement punished. Subjectively also a man in the natural state is bound to assist his neighbour in arriving at the perfection which is the end of his being; but the obligation implies no correlative right to demand its fulfilment, and compliance with it cannot therefore be enforced (*Jus naturæ methodo scientifico pertractatum*; esp. §§ 28, 78, 197, 208, 640, 645, 659, 669, 676). Thus the natural law of Wolff distinguishes, like that of Thomasius, between law and morals, but it again enlarges the compass of the former by expressly importing into it the principle of right to liberty of action. In their results, the one seems to lead to such laws as those which exist in actual human societies, and the other provides free scope for a vague ideal. The principle of liberty was converted by Kant into the key of his system. Liberty is a conception of the pure reason, which presents itself to the will as the necessary condition of its action, and the practical principles founded upon it are the determining causes of particular actions, under a law of free obedience on the part of the will to the dictates of reason, and of corresponding external liberty, the presence of which is as necessary to the action of the will as is internal freedom. The dictates of reason indicate rights and obligations, and law consists in the conditions under which the choice of the individual with regard to their subject matter can be reconciled with that of other men on the assumption of the independence of all upon any constraining will on the part of another; its object is to prevent such aberrant manifestations of will as are inconsistent with the rational liberty of all. Law, however, so defined, cannot exist between states, because they have no machinery for effecting this reconciliation by the use of a 'collective constraining will' through the means of legislation, which can only be employed in an organised social community. They are, therefore, in a relation of non-law, in which force is the only arbiter of disputes; but this



with reference to law, or with reference to law in the one case, and to rules equivalent to law in the other, are wholly dissimilar. Law as within a state is imposed and enforced by a superior, invested with authority for that purpose ; to individuals, therefore, it is immaterial whether they agree with their neighbours as to the speculative basis of law ; they have not to reason out for themselves the rules by which they intend to be governed ; the law is declared to them by a competent authority, and conscientious persons are moved to obedience so soon as the order in which law is conveyed is communicated to them. States, on the other hand, are independent beings, subject to no control, and owning no superior ; no person or body of persons exists to whom authority has been delegated to declare law for the common good ; a state is only bound by rules to which it feels itself obliged in conscience after reasonable examination to submit ; if therefore states are to be subject to anything which can either strictly or analogically be called law, they must accept a body of rules by general consent as an arbitrary code irrespectively of its origin, or else they must be agreed as to the general principles by which they are to be governed.

The second objection is, that even if a theory of absolute right were universally accepted, the measure of the obligations of a state would not be found in its dictates, but in the rules which are received as positive law by the body of states. Just as the legal obligations of an individual are defined, not by the moral ideal recognised in the society to which he belongs, but by the laws in force within it, so no state can have the right to demand that another state shall act in conformity with a rule in advance of the practical morality which nations in general have embodied in the law recognised by them ; and a state cannot itself fall under a legal obligation relation being in itself contrary to the dictates of reason, nations ought to issue from it by agreeing with each other to live in a state of peace. Thus Kant's doctrine on its international side, while it offers an ideal standard of conduct, dispenses with the necessity of obeying it, except on the condition of express compact (*Metaphysische Anfangsgründe der Rechtslehre*).

to act in a different way from that in which it can demand that another state shall act under like circumstances. However useful therefore an absolute standard of right might be as presenting an ideal towards which law might be made to approach continuously nearer, either by the gradual modification of usage or by express agreement, it can only be a source of confusion and mischief when it is regarded as a test of the legal value of existing practices.

If international law consists simply in those principles and definite rules which states agree to regard as obligatory, the question at once arises how such principles and rules as may purport to constitute international law can be shown to be sanctioned by the needful international agreement. No formal code has been adopted by the body of civilised states, and scarcely any principles have even separately been laid down by common consent. The rules by which nations are governed are unexpressed. The evidence of their existence and of their contents must therefore be sought in national acts, in other words, in such international usage as can be looked upon as authoritative. What then constitutes an authoritative international usage?

Up to a certain point there is no difficulty in answering this question. A large part of international usage gives effect to principles which represent facts of state existence, essential under the conditions of modern civilised state life. Whether these are essential facts in the existence of all states is immaterial; several of them indeed are not so. The assumption that they are essential, so far as that group of states which is subject to international law is concerned, lies at the root of the whole of civilised international conduct; and that they have come to be regarded in this light, and unquestionably continue to be so regarded, is sufficient reason for taking as authoritative the principles and rules which result from them. Another portion of international usage gives effect to certain moral obligations, which are recognised as being the source of legal rules with the same unanimity as marks opinion with respect to the facts of state existence.

By what evidence the rules purporting to constitute international law are shown to be accepted as law.

Usage the authority of which is unquestionable.

Of both these kinds of usage it can be affirmed unhesitatingly that certain principles have been internationally accepted, not merely as forms of classification of usage, but as distinct sources of law. In dealing with them, therefore, the international lawyer is justified in going beyond the rules which can be drawn from the bare facts of past practice. He is able, and ought, to hold that principle governs until an exceptional usage is shown to have been established, or at least until it can be shown that the authority of the principle has been broken by practice at variance with it, but not treated as an infringement of the law. In other words, all practices or particular acts, claiming to be legal, which militate against the principles in question, must be looked upon with disfavour, and the onus of proving that they have a right to exist is thrown upon themselves.

It is to be observed that the accepted principles of international law sometimes lead logically to incompatible results. In such cases it is evident that as neither of two ultimate principles can control the other, there is nothing but bare practice which can fix at what point the inevitable compromise is to be made.

Usage of  
which the  
value is  
open to  
question.

It is more difficult to determine the value of arbitrary usages unconnected with principle, or of usages professing either to be the groundwork of rules derogating from accepted principles, or to form exceptions from admitted rules. In some cases their universality may establish their authority; but in others there may be a question whether the practice which upholds them, though unanimous so far as it goes, is of value enough to be conclusive; and in others again it has to be decided which, or whether either, of two competing practices, or whether a practice claiming to support an exception, is strong enough to set up a new, or destroy an old, authority. To solve such questions it is necessary to settle the relative value of national acts. These split themselves into two great divisions, namely, unilateral acts and treaties and other compacts.

It appears to be usually thought that treaties are more Treatise. important indications than unilateral acts of the opinion of the contracting parties as to what is, or ought to be, the law; and it is even frequently considered that they are in some sense a fountain of law to others than the signatory states. The reasoning upon which the latter notion rests is not very intelligible. It is conceded that 'in the full rigour of the law, treaties are only obligatory on the contracting parties;' but it is nevertheless held that 'when a certain number, freely entered into by divers nations, have embodied the same principles of natural law, imparting to it the same interpretation, and adopting the same methods for giving effect to it, although no one of them need be compulsorily applicable to states which have not been parties to it, a sort of jurisprudence—a species of law—is formed, which the majority of nations recognise as being obligatory, even upon those who have not signed any of its constituent parts.'<sup>1</sup> The doctrine is seldom stated with this openness and breadth, but it is more or less consciously implied in the use which is generally

<sup>1</sup> Hautefeuille, *Des Droits et des Devoirs des Nations Neutres: Discours Préliminaire*. Calvo, *Le Droit International*, 2<sup>e</sup> ed. § 19, puts forward the same view more indefinitely, but with sufficient distinctness; and Bluntschli, *Le Droit International Codifié*, 2<sup>e</sup> ed. § 794, adopts it by implication in looking upon the declaration of the Treaty of Paris with respect to the effect of the flag on enemy's goods as universally binding, notwithstanding that the United States have not yet adhered to it. Ortolan (*Diplomatie de la Mer. Notice Additionnelle*) states the reasons for the supposed authority of treaties as follows. The authors, he says, who have asserted it 'ont envisagé successivement et séparément les conventions conclues à diverses époques par chacune des puissances civilisées avec les autres; ils ont reconnu que, dans ces instruments publics ayant pour but non seulement de régler des intérêts de détail et particuliers, mais encore de fixer les grands principes d'intérêt général, quelques uns de ces principes étaient toujours ou le plus souvent reconnus d'un commun accord; que si, dans des temps de guerre ou de mésintelligence, l'abandon de ces principes avait eu lieu quelquefois, les peuples, instruits par expérience des conséquences funestes de cet abandon, avaient proclamé de nouveau ces mêmes principes dans leurs traités de paix, et en avaient stipulé l'observation constante pour l'avenir. Dès lors on a été fondé à déduire de cette conformité presque générale de décisions une théorie de ce qui se pratique en de ce qui doit se pratiquer entre les nations civilisées en vertu des stipulations écrites; et c'est là ce que l'on a nommé droit des gens conventionnel ou des traités.'

made of what is called the conventional law of nations. In spite of the largeness of the support which it thus receives, there can be no hesitation in dismissing it at once as essentially unsound. As a pact between two parties is confessedly incapable of affecting a third who has in no way assented to its terms, the only ground on which it is possible that treaties can be invested with more authority than other national acts is that, when they enshrine a principle, they are supposed to express national opinion, in a peculiarly deliberate and solemn manner, and therefore to be of more value than other precedents. Even if this were the case, treaties would be a long way from establishing 'a sort of jurisprudence' separable from that produced by the aggregate of deliberate national acts; but it cannot be admitted that the greater number of treaties do in fact express in a peculiarly solemn manner, or indeed at all, the views of the contracting parties as to what is or ought to be international law.

Treaties included amongst those which have been supposed to express principles of law appear to be susceptible of division into three classes:—

1. Those which are declaratory of law as understood by the contracting parties.

2. Those which stipulate for practices which the contracting parties wish to incorporate into the usages of the law, but which they know to be outside the actual law.

3. Those which are in fact mere bargains, in which, without any reference to legal considerations, something is bought by one party at the price of an equivalent given to the other.

The first of these kinds is for any purpose of international precedent extremely rare. A few instances there no doubt are of international instruments declaratory of true law; such, for example, as the Protocol signed at the Conference of London in 1871, by which the representatives of Russia, Austria, France, Germany, Great Britain, Italy, and Turkey, stated that they recognised it to be an essential principle of the law of nations that no power can be released from the

engagements of treaties, or modify their stipulations, except with the consent of the contracting parties amicably obtained. But the greater number of the few treaties which profess to be declaratory are of the type of the Acts and Conventions of the two Armed Neutralities, and the Convention for the common defence of the liberty of trade between Denmark and Sweden in 1794, which may be taken by implication to assert the principles of the first Armed Neutrality, and to be declaratory of them as general law. In these cases it is certain that the weight of authority was not in accordance with the provisions of the treaties, and that their object was simply to enforce new rules upon a third state in the common interest of the contracting parties.<sup>1</sup>

Certain introductory clauses, however, are usually found in treaties of commerce, which do in fact involve principles of existing international usage, as in the case of stipulations that there shall be friendship between the contracting nations. This and like covenants are now mere words of surplusage; they add nothing to the authority of the principle which they embody. Once no doubt they were necessary; but long after they ceased to be so they remained as common forms of opening, and it can only be supposed that they owe to their use as such the position which they occupy as the sole exceptions to the general truth that express stipulations are not made to ensure obedience to a law by which both contracting parties would in any case feel themselves to be bound.

Of the second class of treaties there are not many which enunciate principles; but there are a very large number which have for their aim to define the objects which an undisputed principle is to be permitted to affect, or the manner in which it is to be applied. Such are those which enumerate articles contraband of war, and those which pre-

<sup>1</sup> Treaties are often referred to as declaratory of a principle which are not so in fact. Thus the Treaty of Vienna is sometimes said to be declaratory of the principles of the freedom of river navigation. For its true effect see § 39.

scribe the formalities of maritime capture. The value both of the more general and the more specific kinds is great to the international lawyer; not because the conventions which belong to them can be a source of law, but because they show the flow and ebb of opinion, and its strength at a given time with reference to particular doctrines or practices.

Treaties of the third class are not only useless but misleading. Unfortunately, they are also the most numerous. Sometimes they mingle with conventions intended to affirm or extend a principle in such manner as to blur their effect, or even to throw an air of uncertainty on the wishes of the contracting parties; sometimes they contradict in a long succession of separate agreements what from other evidence would appear to be the settled policy of a nation; sometimes they form a mere jumble in which no clue to intention can be traced. Thus in 1801, Great Britain and Russia and Great Britain and Sweden signed treaties by which enemy's goods in neutral vessels were rendered liable to confiscation, while in the same year Russia and Sweden reiterated as between themselves the principle of the armed neutrality under which hostile property was protected by a friendly ship. During the present century the United States have concluded ten treaties under which neutral goods are confiscated in enemy's vessels; but their courts regard such goods as free in all cases not specially provided for by international agreement. Again in 1785 the United States agreed with Prussia that contraband of war should not be confiscable; by their treaty of 1794 with England not only were munitions of war subjected to confiscation, but the list was extended to include materials of naval construction; and in the only treaty since concluded by Prussia, in which the subject is referred to, except two in 1799 and 1828 reviving that of 1785 with the United States, articles contraband of war are dealt with in the usual manner. Instances of like kind might be endlessly multiplied, and it may be safely said that it is rarely that the treaty policy of any country is consistent with itself over a long period of time.

On thus exposing the nature of treaties to analysis, no ground appears for their claim to exceptional reverence. They differ only from other evidences of national opinion in that their true character can generally be better appreciated; they are strong, concrete facts, easily seized and easily understood. They are, therefore, of the greatest use as marking points in the movement of thought. If treaties modifying an existing practice, or creating a new one, are found to grow in number, and to be made between states placed under circumstances of sufficient diversity; if they are found to become nearly universal for a while, and then to dwindle away, leaving a practice more or less confirmed, then it is known that a battle has taken place between new and old ideas, that the former called in the aid of special contracts till their victory was established, and that when they no longer needed external assistance, they no longer cared to express themselves in the form of conventional law. While, therefore, treaties are usually allied with a change of law, they have no power to turn controverted into authoritative doctrines, and they have but little independent effect in hastening the moment at which the alteration is accomplished. Treaties are only permanently obeyed when they represent the continued wishes of the contracting parties.

If the legal value of national acts is not to be estimated with reference to a divine or natural law, and if treaties are mere evidences of national will, not necessarily more important, and occasionally, from being the result of a temporary exigency, less important than some unilateral acts, it remains to be asked whether all indications of national opinion with reference to international law are to be considered of an equal weight, except in so far as their significance is determined by attendant circumstances, and whether, therefore, authority will attach to them in proportion to their number and to the length of time during which they have been repeated. Subject to two important qualifications this may probably be said to be the case.

Conclusions as to the legal value of different kinds of national acts.



The first qualification is that unanimous opinion of recent growth is a better foundation of law than long practice on the part of some only of the body of civilised states. But it must be remembered that as no nation is bound by the acts of other countries in matters which have not become expressly or tacitly a part of received international usage, the refusal of a single state to accept a change in the law, prevents a modification agreed upon by all other states from being immediately compulsory, except as between themselves. The rule, as altered for their purpose, merely becomes an unusually solid foundation of usage, capable of upholding law in less time than if the number of dissentients had been greater. Thus the provisions of the declaration of Paris cannot in strictness be said to be at present part of international law, because they have not received the adherence of the United States; but if the signatories to it continue to act upon those provisions, the United States will come under an obligation to conform its practice to them in a time which will depend on the number and importance of the opportunities which other states may possess of manifesting their persistent opinions.

The second qualification is that there are some states, the usages of which in certain matters must be taken to have preponderant weight. It is impossible to overlook the fact that the practice, first of Holland and England, and afterwards of England and France, exercised more influence on the development of maritime law than that of states weaker on the sea; and it would at the present day be absurd to declare a maritime usage to be legally fixed in a sense opposed to the continued assertion of both Great Britain and the United States. The acts of minor powers may often indicate the direction which it would be well that progress should take, but they can never declare actual law with so much authority as those done by the states to whom the moulding of law has been committed by the force of irresistible circumstance.

# PART I.

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## CHAPTER I.

### PERSONS IN INTERNATIONAL LAW, AND COMMUNITIES POSSESSING AN ANALOGOUS CHARACTER.

§ 1. PRIMARILY international law governs the relations of such of the communities called independent states as voluntarily subject themselves to it. To a limited extent, as will be seen presently, it may also govern the relations of certain communities of analogous character. The marks of an independent state are, that the community constituting it is permanently established for a political end, that it possesses a defined territory, and that it is independent of external control. It is postulated of those independent states which are dealt with by international law that they have a moral nature identical with that of individuals, and that with respect to one another they are in the same relation as that in which individuals stand to each other who are subject to law. They are collective persons, and as such they have rights and are under obligations<sup>1</sup>.

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The communities governed by international law.

These postulates assume the conformity of the nature of such states as are governed by law to the conditions necessarily precedent to the existence of law; because the capacity in a corporate person to be subject to law evidently depends upon

<sup>1</sup> It is frequently said that a necessary condition of the existence of a state is that there shall be a 'sufficient number' of members in the society composing it. It would however be difficult to fix the number of members necessary to a state; and it is hard to see how a community, both independent and politically organised, could fail in the required qualification.

PART I. the existence of a sense of right, and of a sense of obligation  
 CHAP. I. to act in obedience to it, either on the part of the community  
 at large, or at least of the man or body of men in whom  
 the will governing the acts of the community resides. In so  
 far moreover as states are permanently established societies  
 their marks represent a necessary condition of subjection to law.  
 A society for example of which the duration is wholly uncertain  
 cannot offer solid guarantees for the fulfilment of obligations,  
 and cannot therefore acquire the rights which are correlative  
 to them. It cannot ask other communities to enter into  
 executory contracts with it, and at any moment it may cease  
 to be a body capable of being held responsible for the effects  
 of its present acts.

Their  
 marks.

On the other hand, the marks constituted by independence  
 and association with specific territory represent facts which,  
 though they determine the form of the particular law, are  
 not in themselves necessary to law.

The absolute independence of states, though inseparable  
 from international law in the shape which it has received,  
 is not only unnecessary to the conception of a legal relation  
 between communities independent with respect to each other,  
 but, at the very least, fits in less readily with that con-  
 ception than does dependence on a common superior. If  
 indeed a law had been formed upon the basis of the ideas  
 prevalent during the middle ages, the notion of the absolute  
 independence of states would have been excluded from it.  
 The minds of men were at that time occupied with hierarchical  
 ideas, and if a law had come into existence, it must have in-  
 volved either a solidification of the superiority of the Empire,  
 or legislation at the hands of the Pope. Law imposed by a  
 superior was the natural ideal of a religious epoch; and in  
 spite of the fierce personal independence of the men of the  
 Middle Ages, the ideal might have been realised if it had not  
 been for the mutual jealousy of the secular and religious  
 powers. As it was, neither the Church nor the Empire be-  
 came strong enough to impose law. With their definitive

failure to establish a regulatory authority international relations tended to drift into chaos; and in the fifteenth century international life was fast resolving itself into a struggle for existence in its barest form. In such a condition of things no law could be established which was unable to recognise absolute independence as a fact prior to itself; and rules of conduct which should command obedience apart from an external sanction were the necessary alternative to a state of complete anarchy <sup>1</sup>.

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That the possession of a fixed territory is a distinct requirement must be looked upon as the result of more general, but not strictly necessary, circumstances. Abstractedly there is no reason why even a wandering tribe or society should not feel itself bound as stringently as a settled community by definite rules of conduct towards other communities, and though there might be difficulty in subjecting such societies to restraint, or in some cases in being sure of their identity, there would be nothing in such difficulties to exclude the possibility of regarding them as subjects of law, and there would be nothing therefore to render the possession of a fixed seat an absolute condition of admission to its benefits. The explanation of the requirement must be sought in the circumstance of the special civilisation which has given rise to international law. Partly, no doubt, it is to be found in the fact that all communities civilised enough to understand elaborated legal rules have, as a matter of experience, been settled, but the degree to which the doctrines of international law are based upon the possession of land must in the main be attributed to the association of the rights of sovereignty or supreme control over human beings with that of territorial property in

<sup>1</sup> At the period when international law came into existence the only source from which rules of conduct able to command obedience apart from an external sanction could be derived was a supposed law of nature. Thus the necessary doctrine of the independence of states compelled international law to support itself in the first instance on an absolute right. The results of the adoption of this original speculative basis have been, and are, so great that it is worth while to sketch certain aspects of the movement of thought by which it was brought about. See Appendix i.

**PART I.** the minds of jurists at the period when the foundations of  
**CHAP. I.** international law were being laid. The notion of tribal or  
 national sovereignty, universal after the fall of the Roman  
 empire, disappeared during the middle ages before the feudal  
 idea which united the right of control with the possession of  
 determinate portions of land; and the substitution of the  
 conceptions of Roman law for those of feudalism tended to  
 strengthen the bond of connection. As the result of this  
 substitution, land actually under the administration of a  
 particular person became freed from the paramount title or  
 authority of others; the notion of 'dominium' was intro-  
 duced; and by the sixteenth century the person or persons  
 possessing sovereignty within a specific territory were deemed  
 its absolute owners. From the invariable association of land  
 with sovereignty, or in other words with exclusive control,  
 over the members of a specific society, to the necessary asso-  
 ciation of such control with the possession of land, is a step  
 which could readily be made, and which became inevitable  
 when no instances were present of civilised communities with-  
 out fixed seats.

When a  
 community  
 becomes  
 a person  
 in law.

§ 2. States being the persons governed by international  
 law, communities are subjected to law, with a certain excep-  
 tion which will be dealt with presently, from the moment,  
 and from the moment only, at which they acquire the marks  
 of a state. So soon, therefore, as a society can point to the  
 necessary marks, and indicates its intention of conforming to  
 law, it enters of right into the family of states, and must be  
 treated in conformity with law. The simple facts that a  
 community in its collective capacity exercises undisputed and  
 exclusive control over all persons and things within the ter-  
 ritory occupied by it, that it regulates its external conduct  
 independently of the will of any other community, and in  
 conformity with the dictates of international law, and finally  
 that it gives reason to expect that its existence will be  
 permanent and sufficient to render it a person in law. On  
 the other hand, since, with the exception above-mentioned,

communities become subject to law from the moment only at which they acquire the marks of a state, international law takes no cognizance of matters anterior to the acquisition of those marks, and is, consequently, indifferent to the means which a community may use to form itself into a state. The legal status of a duly organised community is affected neither by moral faults of origin, nor by violations of right by which its establishment may have been accompanied, unless the violations have been such as to make it doubtful whether the community claiming to be a state will be able or willing to fulfil its legal obligations.

The personal identity which is thus established exists in the eye of the law solely for international purposes. It is therefore retained so long as the corporate person undergoes no change which essentially modifies it from the point of view of its international relations, and with reference to them it is evident that no change is essential which leaves untouched the capacity of the state to give effect to its general legal obligations or to carry out its special contracts.

It flows necessarily from this principle that internal changes have no influence upon the identity of a state. A community is able to assert its rights and to fulfil its duties equally well, whether it is presided over by one dynasty or another, and whether it is clothed with the form of a monarchy or a republic. It is unnecessary that governments, as such, shall have a place in international law, and they are consequently regarded merely as agents through whom the community expresses its will, and who, though duly authorised at a given moment, may be superseded at pleasure. This dissociation of the identity of a state from the continued existence of the particular kind of government which it may happen to possess is not only a necessary consequence of the nature of the state person; it is also essential both to its independence and to the stability of all international relations. If in altering its constitution a state were to abrogate its treaties with other countries, those countries in self-defence would

PART I. place a veto upon change, and would meddle habitually  
CHAP. I. in its internal politics. Conversely, a state would hesitate  
— to bind itself by contracts intended to operate over periods  
of some length, which might at any moment be rescinded  
by the accidental results of an act done without reference  
to them. Even when internal change takes the form of  
temporary dissolution, so that the state, either from social  
anarchy or local disruption, is momentarily unable to fulfil  
its international duties, personal identity remains unaffected;  
it is only lost when the permanent dissolution of the state is  
proved by the erection of fresh states, or by the continuance  
of anarchy so prolonged as to render reconstitution impossible  
or in a very high degree improbable.

The identity of a state is also unaffected by external modification through accession or through loss of part of its territory. It is seldom, if ever, that enlargement so interferes with the continuity of its life as to make it difficult to carry out international obligations. Annexation implies that the identity of the annexed territory is merged in that of the state to which it is added. The former, therefore, by becoming part of the latter, becomes subject to its obligations; while the annexing state, for the same reason, is not bound by personal contracts affecting its new acquisition, except when, having absorbed a state in its entirety, it becomes heir to the whole of the property of the latter, and consequently is morally obliged to accept responsibility for the debts with which it may have been burdened. The case of loss of territory is so far different that it may become impossible for a state to perform duties of guarantee or alliance under which it may lie by special agreement, but inability to perform contracts of this kind obviously leaves untouched both the capacity to give effect to general legal obligations, and to carry out special agreements based merely upon the possession of independence. The identity of a state therefore is considered to subsist so long as a part of the territory which can be recognised as the essential portion through the preservation

of the capital or of the original territorial nucleus, or which represents the state by continuity of government, remains either as an independent residuum or as the core of an enlarged organization.

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States cease to exist by being absorbed into other states as the result of conquest or of peaceful agreement, by being split into two or more new states in such manner that no part can be looked upon as perpetuating the national being<sup>1</sup>, and by being united upon equal terms with others into a new state.

When personal identity is lost.

§ 3. Communities possessing the marks of states imperfectly are in some cases admitted to the privilege of being subject to international law, in so far as they are capable of being brought within the scope of its operation.

Communities possessing the marks of a state imperfectly.

§ 4. A state in its perfect form has, in virtue of its independence, complete liberty of action, subject to law, in its relations with other states; and its liberty, for the purposes of international law, is not considered to be destroyed by the fact that it has concluded agreements fettering its action, provided that such agreements are terminable at any moment or upon stipulated notice, or provided that they are not of such nature in themselves as to necessarily subordinate the national will for an indefinite time to that of another power. But so soon as compacts are entered into, which are not intended to be revocable, or are not likely by the nature of their provisions to be susceptible of unilateral revocation, and which, at the same time, subject the external action of a state to direction by a will other than its own, it ceases within the sphere of these compacts to be independent, and consequently to be a person in international law. Its personality is not however wholly merged, and in matters not covered by the compacts it retains its normal legal position.

States in possession of imperfect independence.

States commonly understood to be subject to law in a partial manner are classed under the several heads of states joined to others by a personal, real, federal or confederate union, and

The usual classification of such states.

<sup>1</sup> This for instance would occur if Austria were to separate into German, Hungarian, Czech, Polish, and South Slavonic states.



PART I. of states placed under the protection or suzerainty of others<sup>1</sup>.

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For international purposes, however, this classification is in great part immaterial. When it is proposed to place a community under the head of those which are capable of entering into some only of the relations with other states which are contemplated by international law, the only questions which require to be settled are whether its independence is in fact impaired, and if so, in what respects and to what degree. The nature of the bond derogating from independence which unites the community to another society is a matter, not of international, but of public law; because in so far as the former is identified with that society in its relations with other states, it is either a part of it, or in common with it is part of a composite state.

Whether states linked by a personal union, and members of federal states are among such states for the purposes of international law.

Looking at the subject from this point of view, states linked by a personal union may at once be excluded from consideration. A personal union exists, as in the instance of Great Britain and Hanover, from 1714 to 1837, when two states, distinct in every respect, are ruled by the same prince; and they are properly regarded as wholly independent persons who merely happen to employ the same agent for a particular class of purposes, and who are in no way bound by or responsible for each others' acts<sup>2</sup>. For the opposite

<sup>1</sup> Some confusion is apt to creep into the arrangement of existing states, under the proper heads, because of the inappropriate names by which some of them are designated,—as in the case of the new German Empire, which to save the *amour propre* of the component parts is called a confederated Empire,—and because in some instances of deficient attention on the part of writers to the essential facts. The characteristics properly distinguishing the different classes are, however, sufficiently well defined; see Ortolan, *Dip. de la Mer* (4<sup>e</sup> ed.), liv. i. ch. 2; Heffter, *Le Droit International de l'Europe* (3<sup>e</sup> ed.), §§ 20-1; Bluntschli, §§ 70, 75, 76, 78; Calvo, § 33-44.

<sup>2</sup> M. Heffter says (§ 20) that states joined by a personal union cannot make war upon one another. I fail to see what legal justification can be given for this assertion so long as the prince is looked upon as the organ or agent and not as the sovereign-owner of the state. Of course it is not as a matter of fact likely that war will be made without previous expulsion of the sovereign from one or the other, but this has obviously nothing to do with the matter in its legal aspect.

The term 'personal union' is sometimes applied when 'the individuality of the state is merged by such personal union, and with respect to its external

reason the members of a federal state are equally excluded from the category of states possessed of imperfect independence. The distinguishing marks of a federal state upon its international side consist in the existence of a central government to which the conduct of all external relations is confided, and in the absence of any right on the part of the states forming the corporate whole to separate themselves from it. Under the Constitution of the United States, for example, the central authority regulates commerce, accredits diplomatic representatives, makes treaties, provides for the national defence, declares war and concludes peace; the individual states, on the other hand, are expressly forbidden to enter into any agreement with foreign powers without the assent of Congress, to maintain military or naval forces, or to engage in war. The citizens of the United States have a common nationality<sup>1</sup>. Again, in the two kingdoms of Sweden and Norway an hereditary king is invested with like power to that which belongs to the federal government of the United States, and provision is made, in case of extinction of the dynasty, for the election of a new common head, so that the permanence of the union is secured<sup>2</sup>. Under the Constitution of 1871, the German empire forms another state of the same character, notwithstanding that some of the component parts possess the complimentary privilege of receiving

relations, remains for the time in abeyance, but emerges again on the dissolution of the union, and resumes its rank and position as an independent sovereign state;’ Halleck, *International Law* (ed. London 1878), i. 62; see also Phillimore, *Commentaries upon International Law* (ed. 1855), § lxxvi. The relation thus described is wholly different from that of personal union in the ordinary sense; so long as it lasts, it is practically identical with that of real union. It only differs from the latter in that it purports to be terminable on the death of an individual or the cessation of a dynasty, while a real union, though not always in fact independent of a change in the personal sovereign, is contemplated as permanent. It is difficult to understand the advantage of classing together cases which are broadly distinct from each other, and of separating cases which for the purposes of international law are indistinguishable.

<sup>1</sup> Constitution of the United States in Story, *Commentaries on the Constitution of the United States*, i. xvii.

<sup>2</sup> De Martens, *Nouveau Recueil des Traités de Paix*, ii. 608.

**PART I.** foreign ministers at their courts, and of accrediting ministers empowered to deal with matters not reserved to the Imperial Government. All Germans have a common nationality. The joint will of the several states regulates by means of the Imperial Government all matters connected with the diplomatic representation of the corporate state, and the latter has sole power of concluding treaties of peace and alliance, or treaties of any other kind for political objects, commercial treaties, conventions regulating questions of domicile and emigration, postal matters, protection of copyright and consular matters, extradition treaties and other conventions connected with the administration of civil or criminal law. Whenever members of the Confederation do not fulfil their constitutional duties, which include obedience to the central authority in the above matters, they may be constrained to do so by way of execution<sup>1</sup>.

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**Real union.** A real union is indistinguishable for international purposes from a federal union. It occurs when states are indissolubly combined under the same monarch, their identity being merged in that of a common state for external purposes, though each may retain distinct internal laws and institutions. Such differences as exist between a state so composed and a federal state are merely matters of public law.

States in possession of imperfect independence. Confederated states.

Of states in possession of imperfect independence, confederated states are those which have the highest individuality. The union which is established between them is strictly one of independent states which consent to forego permanently a part of their liberty of action for certain specific objects, and they are not so combined under a common government that the latter appears to their exclusion as the international entity. The best example of a union of this kind is supplied by the German confederation as it existed from 1820 to

<sup>1</sup> Hertslet, *Map of Europe by Treaty*, 1931. The other instances of Federal union at present existing are Mexico, Colombia, the Swiss and Argentine Confederations. For the constitution of Switzerland, see De Martens, *Nouv. Rec. Général*, xi. 129. That of the Argentine confederation is nearly identical with that of the United States. Calvo, i. § 49; Twiss, *The Law of Nations*, i. § 48-9.

1866<sup>1</sup>. By the Act under which it was constituted, its objects were defined to be the maintenance of the external and internal security of Germany, and the independence and inviolability of the confederated states, who mutually guaranteed each others' possessions, and who could not make war on one another. A Diet was instituted, composed of plenipotentiaries of the states, which formed the organ of the Confederation for common external matters, and which, consequently, could receive and accredit envoys and conclude treaties on behalf of the Confederation, and could declare war against foreign states on the territory of the Confederation being threatened. These powers were not however exclusive. The individual states retained the right of receiving and accrediting ministers, of making treaties, and of forming any alliance of which the terms should not be prejudicial to the Confederation, and if the majority of the Diet decided in a case alleged to be one of common danger, that no such risk of hostile attack as would call the united forces of the Confederation into the field existed, the minority was authorised to concert measures of self-defence. The several states had no right of withdrawal from the Confederation, and when war had been declared by the Diet they could not make a separate peace; but the Diet had no means of constraining a recalcitrant state, except by using the military forces of other states, which could only be employed with their consent, and there was no trace of over-sovereignty affecting individual subjects of the respective states, who remained subjects of those states only, and had no common nationality. Thus the liberty of action of the various members of the Confederation was restrained so far only as was necessary for the common peace and the integrity of the different territories.

For the purposes of international law<sup>2</sup> a protected state

<sup>1</sup> The Confederation was formed in 1815, but it was not finally organised until the signature of the Schluss Act in 1820. See the Federal Act in De Martens, *Nouv. Rec.* ii. 353, and the Schluss Act, *id.* v. 466.

<sup>2</sup> Protected states such as those included in the Indian Empire of Great Britain are of course not subjects of international law.

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Protected  
states.

is one which, in consequence of its weakness has placed itself under the protection of another power on defined conditions, or has been so placed under an arrangement between powers the interests of which are involved in the disposition of its territory. The incidents of a protectorate may vary greatly; but in order that a community may fall within the category of the protected states which are persons in international law, it is necessary that its subjects shall retain a distinct nationality, and that its relations to the protecting state shall be consistent with its neutrality during a war undertaken by the latter; in other words, its members must owe no allegiance except to the community itself, and its international liberty must be restrained in those matters only in which the control of the protecting power tends to prevent hostile contact with other states, or to secure safety if hostilities arise. So long as these conditions are observed the external relations of the state may be entirely managed by the protecting power. The most important modern instance of a protected state is afforded by the United Republic of the Ionian Islands, established in 1815 under the protectorate of Great Britain. In this case the head of the government was appointed by England, the whole of the executive authority was practically in the hands of the protecting power, and the state was represented by it in its external relations. In making treaties however Great Britain did not affect the Ionian Islands unless it expressly stipulated in its capacity of protecting power; the vessels of the republic carried a separate trading flag; the state received consuls, though it could not accredit them; and during the Crimean War it maintained a neutrality the validity of which was acknowledged in the English Courts<sup>1</sup>.

<sup>1</sup> De Martens (Nouv. Rec. ii. 663) and Hertlet (338) give the Austro-British Convention declaring the Ionian Islands to be an independent state under the protection of Great Britain; identical conventions were concluded with Russia and Prussia. The *Leucade*, Spinks, Adm. Prize Cases, 1854-6, 237. For the cases of Cracow and Monaco, see Twiss, i. § 27 and 32. The Danubian Principalities and Servia have also usually been mentioned

States under the suzerainty of others are portions of the latter which during a process of gradual disruption or by the grace of the sovereign have acquired certain of the powers of an independent community, such as that of making commercial conventions, or of conferring their exequatur upon foreign consuls. Their position differs from that of the foregoing varieties of states in that a presumption exists against the possession by them of any given international capacity. A member of a confederation or a protected state is *prima facie* independent, and consequently possesses all rights which it has not expressly resigned; a state under the suzerainty of another, being confessedly part of another state, has those rights only which have been expressly granted to it, and the assumption of larger powers of external action than those which have been distinctly conceded to it is an act of rebellion against the sovereign.

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under the  
suzerainty  
of others.

§ 5. When a community in attempting to separate itself from the state to which it belongs, sets up a government and carries on hostilities in a regular manner, it shows in the course of performing these acts a more complete momentary independence than those communities, mentioned in the last section, of which the independence is qualified. But full independence at a given moment is consistent with entire uncertainty as to whether it can be permanently maintained, and without a high probability of permanence a community fails to satisfy one of the conditions involved in its conception as a legal person. Frequently however it is admitted, through what is called recognition as a belligerent, to the privileges of law for the purposes of the hostilities in which it has engaged in order to establish its legal independence. Such recognition may be accorded either by a foreign state, or by that from which the community has revolted. In the former case the effect is to give the belligerent community rights and duties, among protected states. As, however, both Roumania and Servia until their acquisition of independence by the Treaty of Berlin, legally formed part of the Turkish dominions, their case is the abnormal one of a protectorate exercised rather as against than in support of the sovereign of the country.

Belligerent  
communi-  
ties.

Their re-  
cognition  
as being  
possessed of  
belligerent  
rights.

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identical with those attaching to a state, for the purposes of its warlike operations, as between it and the country recognising its belligerent character, and also to compel the state at war with it to treat the recognising country as a neutral between two legitimate combatants, unless the good faith of the recognition can be impugned, when, as a wrong has been committed, the right accrues to obtain satisfaction by war. In the second ~~case~~ the state puts itself under an obligation to ~~treat~~ its revolted subjects as enemies and not rebels until hostilities are ended, and asserts its intention on the ground of the existence of war to throw upon other countries the duties, and to confer upon them the rights, of neutrality. So soon as recognition takes place, the parent state ceases to be responsible to such states as have accorded recognition, and when it has itself granted recognition to all states, for the acts of the insurgents, and for losses or inconveniences suffered by a foreign power or its subjects in consequence of the inability of the state to perform its international obligations in such parts of its dominions as are not under its actual control.

The effect of recognition being so important, not merely to the society recognised, but to foreign countries and to the parent state, it becomes necessary to fix as accurately as possible the conditions under which it may be granted. Putting aside the case of recognition by the parent state, which it may be assumed would not be given with undue haste, and by which therefore, if given before foreign recognition, it is not likely that the interests of foreign states would be prejudiced, the questions remain, whether a community claiming to be belligerent has a right under any circumstances to demand its recognition as such, and under what circumstances a foreign state may voluntarily accord recognition.

Whether  
they have  
a right to  
demand

The first of these questions may be readily answered. It only requires to be put at all because of a certain confusion which is sometimes introduced into the subject of the re-



cognition of belligerent character by mixing up its moral with its legal aspects. As soon, it is said, as a considerable population is arrayed in arms with the professed object of attaining political ends, it resembles a state too nearly for it to be possible to treat individuals belonging to such population as criminals<sup>1</sup>; it would be inhuman for the enemy to execute his prisoners; it would be still more inhuman for foreign states to

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such re-  
cognition.

<sup>1</sup> It is implied by Vattel (*Le Droit des Gens*, liv. iii. ch. xviii. § 293-4), and stated by Bluntschli (§ 512), that insurgents possessing these characteristics have a legal right to recognition. See also President Monroe's Message on the recognition of the South American Republic in 1822; De Martens, *Nouv. Rec.* vi. i. 149. Somewhat loose language has also been used by English statesmen. In 1861 Lord John Russell, in answering a question in the House of Commons, said that 'with respect to belligerent rights in the case of certain portions of a state being in insurrection, there was a precedent which seems applicable to this purpose in the year 1825. The British government at that time allowed the belligerent rights of the provisional government of Greece, and in consequence of that allowance the Turkish government made a remonstrance. The Turkish government complained that the British government allowed to the Greeks a belligerent character, and observed that it appeared to forget that to subjects in rebellion no national character could properly belong. But the British government informed Mr. Stratford Canning that "the character of belligerency was not so much a principle as a fact, that a certain degree of force and consistency acquired by any mass of population engaged in war entitled that population to be treated as a belligerent, and even if this title were questionable, rendered it the interest well understood of all civilised nations so to treat them."' (Hansard, 3rd Series, clxii. 1566.) It is impossible to be certain on the terms of the despatch to Mr. Stratford Canning whether the British government intended to convey an impression that the Greek insurgents merely deserved, or that they had a legal right to, belligerent recognition.

There is no room for a like doubt as to the effect of a claim made by the United States on its own behalf against Denmark. In 1779 the latter power delivered up to England some merchant vessels of which Paul Jones had made prize, and which had been sent into Norwegian ports. Compensation was demanded, and in the course of the negotiation it was argued that 'in the case of a revolution in a sovereign empire, by a province or colony shaking off the dominion of the mother country, and whilst the civil war continues, if a foreign power does not acknowledge the independence of the new state, and form treaties of commerce and amity with it, though still remaining neutral, as it may do, or join in an alliance with one party against the other, thus rendering that other its enemy, it must, while continuing passive, allow to both the contending parties all the rights, which public war gives to independent sovereigns.' (Lawrence's *Wheaton's Elem.*, Introd. cxxxiv.) The claim against Denmark was kept alive by intermittent action until 1843, and does not appear to have been ever formally dropped.



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capture and hang the crews of war-ships as pirates; humanity requires that the members of such a community shall be treated as belligerents, and if so there must be a point at which they have a right to demand what confessedly must be granted. So far, the correctness of this view may at once be admitted. It is no doubt incumbent upon a state to treat subjects who may have succeeded in establishing a temporary independence as belligerents and not as criminals, and if it is incumbent upon the state itself, it is still more so upon foreign governments, who deal only with external facts, and who have no right to pass judgment upon the value, from a moral or municipally legal point of view, of political occurrences taking place within other countries. But the obligation to act in this manner flows directly from the moral duty of human conduct, and in the case of foreign states from that also of not inflicting a penalty where there is no right to judge; it has nothing to do with international law. As a belligerent community is not itself a legal person, a society claiming only to be belligerent, and not to have permanently established its independence, can have no rights under that law. It cannot therefore demand to be recognised upon legal grounds, and recognition, when it takes place, either on the part of a foreign government, or of that against which the revolt is directed, is from the legal point of view a concession of pure grace.

True  
ground of  
recognition.

The right of a state to recognise the belligerent character of insurgent subjects of another state must then, for the purposes of international law, be based solely upon a possibility that its interests may be so affected by the existence of hostilities in which one party is not in the enjoyment of belligerent privileges, as to make recognition a reasonable measure of self-protection. As a matter of fact this condition of things may arise so soon as hostilities approach the borders of the state which is their scene, and is inseparable from their extension to the ocean. In a time of maritime war between two states neutral powers concede to the belligerents certain

rights which abridge the freedom of action of their subjects, and they allow the property of the latter to be seized and confiscated for acts which in time of peace would fall within the range of legitimate commerce. The possession of these belligerent privileges is necessary to the effective prosecution of hostilities; when therefore a government is engaged in a struggle with insurgents in command of a sea-coast it invariably uses, and consequently all states at the outbreak of civil war may be expected to use, the same means of putting a stress upon an antagonist as would be employed against an enemy state. But these means, so far as they affect other powers, are only acquiesced in because of the existence of war, and under limitations and safeguards which, being prescribed by international law with reference only to war, could not be insisted upon during the continuance of nominal peace. The assailed community also cannot be expected to refrain from using like weapons to those with which it is attacked, and refusal on the part of foreign powers to acknowledge its right to act in the manner which is permitted to a state, would be met by force at the moment if it were strong enough, and would at any rate cause a resentment to which effect might be given at a future time if the insurgent community ultimately conquered independence.

Testing the right of a state to recognise insurgent communities as belligerent by the relation of the war to its own interest, three classes of cases may be distinguished with reference to which its conduct will naturally differ. So long as a government is struggling with insurgents isolated in the midst of loyal provinces, and consequently removed from contact with foreign states, the interests of the latter are rarely touched, and probably are never touched in such a way that they can be served by recognition. It is not therefore necessary, and it is not the practice, to recognise communities so placed, however considerable they may be, and however great may be the force at their disposal. When a state is contiguous with a revolted province it may be

Circumstances under which recognition is permissible.

PART I. different. The incidents of continental war are such as  
 CHAP. I. to render the probability of embarrassment small, and it is  
 therefore usual to leave cases involving questions of belligerent character to be dealt with as they arise, but it must be for the foreign state to decide whether its immediate or permanent interests will be better secured by conceding or withholding recognition, and though recognition except under peculiar circumstances may expose the conduct of a government to suspicion, the grant of recognition cannot be said to exceed the legal powers of the state. In the case of maritime war the presumption of propriety lies in the opposite direction. No circumstances can be assumed as probable under which the interests of a foreign state possessed of a mercantile marine will not be affected, and it may recognise the insurgent community, without giving just cause for a suspicion of bad faith, so soon as a reasonable expectation of maritime hostilities exists, or so soon as acts are done at sea by one party or the other which would be acts of war if done between states, unless it is evidently probable that the independent life of the insurgent government will be so short that the existence of war may be expected to interfere with the interests of the foreign state in a merely transient and unimportant manner<sup>1</sup>.

<sup>1</sup> On the general question of recognition of belligerency, see Wheaton, *Elements of International Law* (ed. Lawrence, 1855), pt. i. ch. ii. § 7, and Dana's note (No. 15) upon the passage; Bluntschli, § 512, and in the *Revue de Droit International*, ii. 452; Calvo, § 68-70; Bernard, *Historical Account of the Neutrality of Great Britain during the American Civil War*, ch. 5 and 7.

A state engaged in civil war has not the right of endeavouring to effect its warlike objects by measures which, though permissible in peace, are not allowed in time of war. In 1861, New Granada being in a state of civil war, its government announced that certain ports would be closed, not by blockade, but by order. Lord John Russell, speaking upon the subject, said, 'that it was perfectly competent to the government of a country in a state of tranquillity to say which ports should be open to trade, and which should be closed. But in the event of insurrection or civil war in that country, it was not competent for its government to close ports which were *de facto* in the hands of the insurgents, and that such a proceeding would be an invasion of the international law relating to blockade.' Hansard, clxiii. 1646. Subsequently, the government

Recognition, when once it has been accorded, is irrevocable except by agreement, so long as the circumstances exist under which it was granted, for although as between the grantor and the grantee it is a concession of pure grace, and therefore revocable, as between the grantor and third parties new legal relations have been set up by it, which being dependent on the existence of a state of war, cannot be determined at will so long as the state of war continues in fact. In other words, a state, whether it be belligerent or neutral, cannot play fast and loose with the consequences of a certain state of things; it cannot regulate its conduct simply by its own convenience. In refusing or granting recognition it casts special responsibilities upon other states; it is to be supposed that whatever course it adopts is for its advantage at the time of choice; it must therefore accept the responsibility which is correlative to the advantage, even though it should subsequently turn out that a disproportionate burden is imposed in the end.

The recognition by England of the Confederate States as belligerents in 1861 affords an example of the recognition of belligerent character, interesting both because the case presents a strongly marked instance of the circumstances which compel recognition on the part of a foreign power, and because of the controversy which arose between the governments of the United States and of Great Britain with reference to the propriety and opportuneness of recognition on the occasion in question. During the first three months of 1861 seven of the states composing the United States formed themselves into a separate Union, with a constitution intended to be permanent, under a fully constituted executive

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With-  
drawal  
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tion.

Recogni-  
tion by  
England  
of the Con-  
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states as  
belligerents

of the United States proposed to adopt the same measure against the ports of the Southern States, upon which Lord John Russell wrote to Lord Lyons that 'Her Majesty's government entirely concur with the French government in the opinion that a decree closing the southern ports would be entirely illegal, and would be an evasion of that recognised maxim of the law of nations that the ports of a belligerent can only be closed by an effective blockade.' State Papers, North America, No. i. 1862. In neither case was the order carried out.

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government, and with an elected legislative body. The insurgent community therefore possessed a government established as formally as is possible in a society the separate political existence of which is not acknowledged. Immediately on being constituted the executive took active measures to organise a military force; and hostilities broke out on the 11th of April with the bombardment of Fort Sumter by the Southern troops. Within a few days afterwards 75,000 men were called out in the Northern states, while before the end of the month 100,000 men were under arms in the revolted portion of the country. Actual war existed on a large scale, and there was every reason to believe that it would be conducted by the Confederate states in accordance with the rules of international law. Up to this point however, though the insurgent community satisfied the conditions necessarily precedent to recognition, there was no imperative reason for notice to be taken of it by foreign powers. The scene of war was remote, and the ocean as yet remained unaffected. But on the 17th April the President of the Southern States issued a Proclamation inviting applications for letters of marque and reprisal, and as at this period a large extent of coast was in the hands of the insurgents, such an expectation of maritime hostilities might have been reasonably entertained as to have justified immediate recognition. The likelihood of maritime war was converted into a certainty by a Proclamation issued by President Lincoln on the 19th April, which declared the coasts of the seceded states to be under blockade. Thus, when on the 14th May a Proclamation of neutrality was issued by the British Government, twelve days after it received intelligence that the two American Proclamations had been put forth, the condition of affairs was as follows:—the government of the United States had recognised the belligerent character of the Southern confederacy by proclaiming a blockade, that being a measure the adoption of which admitted the existence of war, in rendering foreign ships liable to penalties illegal

except in time of war<sup>1</sup>; apart from the effect of the blockade as a recognition of belligerency, every element of a state of war between a legitimate government and a community in possession of *de facto* sovereignty was fully in existence, under circumstances making it probable that British interests would be gravely affected; finally, as the intercourse between England and North America was both large and incessant, and the cargoes belonging to English owners lying at the time in the Mississippi alone were worth a million sterling, it was obviously of immediate importance that the British Government should warn traders of the existence of a state of things which affected them with duties, and by which their freedom of commerce was restrained. The action of Great Britain was therefore not only justified but necessary. By the Government of the United States however it was made the subject of reiterated complaint. It was at first alleged that no war existed, that no war could exist so long as the United States retained the legal sovereignty of their dominions, and that therefore it was not in the power of a foreign state to recognise any society within their boundaries as having rights of war; it was necessary, in short, that recognition of independence should precede recognition of belligerency. This contention being not only untenable in itself, but being opposed to decisions given in the courts of the United States, it was succeeded by an assertion that although 'a nation is its own judge when to accord the rights of belligerency,' recognition which 'has not been

<sup>1</sup> 'Now therefore, I, Abraham Lincoln, President of the United States . . . have deemed it advisable to set on foot a blockade of the ports within the states aforesaid in pursuance of the Laws of the United States and of the Law of Nations in such case provided. For this purpose a competent force will be posted so as to prevent entrance and exit of vessels from the ports aforesaid. If therefore, with a view to violate such blockade, a vessel shall approach, or shall attempt to leave, any of the said ports, she will be duly warned by the commander of one of the blockading vessels, who will endorse on her register the fact and the date of such warning; and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port, for such proceedings against her and her cargo as prize as may be deemed advisable.' Proclamation of the 19th April, 1861.

PART I. justified on any ground of either necessity or moral rights<sup>1</sup>  
 CHAP. I. is 'an act of wrongful intervention,' and it was urged that no  
 necessity had arisen at the time of the issue of the Queen's  
 Proclamation. No definition of necessary emergency was  
 offered; but the refusal to admit an imminent certainty  
 that the interests of a foreign state will be seriously touched  
 by the operations of war as a due ground for recognition of  
 belligerent character, implies that it is the duty of a state  
 before according recognition to allow some illegal acts, at  
 least, to be done at the expense of its subjects. To state such  
 a contention is to demonstrate its inadmissibility<sup>2</sup>.

§ 6. It is scarcely necessary to point out that as international law is a product of the special civilisation of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognised by countries differently civilised, such states only can be presumed to be subject to it as are inheritors of that civilisation. They have lived, and are living, under law, and a positive act of withdrawal would be required to free them from its restraints. But states outside European civilisation must

<sup>1</sup> It is not altogether clear what is intended by the phrase 'moral rights.' Probably however it means moral right on the part of an oppressed community to be recognised. If so, it is an instance of an intrusion of sentimental, moral, or political, considerations into the sphere of pure law, which was frequent in American argument during the British-American controversies which took place from 1861 to 1872.

<sup>2</sup> Bernard, *British Neutrality*, chaps. iv-vii; Mr. Seward to Mr. Adams, Jan. 19, 1861, *State Papers, North America*, No. ii. 1862; Mr. Seward to Mr. Adams, Jan. 12, 1867, *State Papers, North America*, No. i. 1867; *Case of the United States laid before the Tribunal of Arbitration at Geneva*, p. 17; *The brig Amy Warwick and others*, ii. Black, 635; *Woolsey's International Law*, note 19. M. Bluntschli sums up an examination of the controversy by saying, 'Tout le monde était d'accord qu'il y avait guerre, et que dans cette guerre, il y avait deux parties belligérantes. Mais voilà, et voilà seulement ce que les Cabinets de France et de l'Angleterre ont présumé, en reconnaissant la Confédération comme étant de fait une puissance belligérante. Je ne puis donc en aucune façon y voir une injustice, une violation de droit pratiquée au détriment de l'Union. Que la déclaration ait été faite un peu plus tôt ou un peu plus tard, c'était là une question qui regardait la politique, non le droit.' *Rev. de Droit Int.* ii. 462.



formally enter into the circle of law-governed countries. They must do something with the acquiescence of the latter, or of some of them, which amounts to an acceptance of the law in its entirety beyond all possibility of misconstruction. It is not enough consequently that they shall enter into arrangements by treaty identical with arrangements made by law-governed powers, nor that they shall do acts, like sending and receiving permanent embassies, which are compatible with ignorance or rejection of law. On the other hand, an express act of accession can hardly be looked upon as requisite. By the Treaty of Paris in 1856 Turkey was declared to be admitted 'to a participation in the advantages of the public law of Europe and the system of concert attached to it;' but if she had been permitted, without such express admission, to sign the Declaration accompanying the Treaty, which was in fact signed on her behalf, and of which the object was to lay down principles intended to be reformatory of law, it could scarcely have been contended that the legal responsibilities and privileges of Turkey were to be limited to matters covered by those principles.

When a new state comes into existence its position is regulated by like considerations. If by its origin it inherits European civilisation, the presumption is so high that it intends to conform to law that the first act purporting to be a state act which is done by it, unaccompanied by warning of intention not to conform, must be taken as indicating an intention to conform, and brings it consequently within the sphere of law. If on the other hand it falls by its origin into the class of states outside European civilisation, it can of course only leave them by a formal act of the kind already mentioned.



## CHAPTER II.

### GENERAL PRINCIPLES OF THE LAW GOVERNING STATES IN THEIR NORMAL RELATIONS.

#### PART I.

#### CHAP. II.

The fundamental rights and duties of states.

§ 7. THE ultimate foundation of international law is an assumption that states possess rights and are subject to duties corresponding to the facts of their postulated nature. In virtue of this assumption it is held that since states exist, and are independent beings, possessing property, they have the right to do whatever is necessary for the purpose of continuing and developing their existence, of giving effect to and preserving their independence, and of holding and acquiring property, subject to the qualification that they are bound correlatively to respect these rights in others. It is also considered that their moral nature imposes upon them the duties of good faith, of concession of redress for wrongs, of regard for the personal dignity of their fellows, and to a certain extent of sociability.

Right of continuing and developing existence.

§ 8. Under the conditions of state life, the right to continue and develop existence gives to a state the rights—

1. To organise itself in such manner as it may choose.
2. To do within its dominions whatever acts it may think calculated to render it prosperous and strong.
3. To occupy unappropriated territory, and to incorporate new provinces with the free consent of the inhabitants, provided that the rights of another state over any such province are not violated by its incorporation.

Thus a state may place itself under any form of government that it wishes, and may frame its social institutions upon any

model. To foreign states the political or social doctrines which may be exemplified in it, or may spread from it, are legally immaterial. A state has a right to live its life in its own way, so long as it keeps itself rigidly to itself, and refrains from interfering with the equal right of other states to live their life in the manner which commends itself to them, either by its own action, or by lending the shelter of its independence to persons organising armed attack upon the political or social order elsewhere established.

Again, a state is free to adopt any commercial policy which it thinks most to its advantage; it may erect fortifications anywhere within its dominions; and it may maintain military or naval forces upon any scale, and organised in any way, that it likes. That the latter measures may invest it with a strategical position or a material strength which under certain contingencies may be a danger to other powers gives them in general no right to take umbrage or to endeavour to restrain its growth. In the absence of distinct menace the only precaution which can be taken is to arm with equal care. It is not an exception to this rule that it is legitimate to anticipate an attack which measures adopted by a state under colour, or in the exercise, of its right of self-development afford reasonable ground to expect. The same right to continued existence which confers the right of self-development confers also the right of self-preservation, and a point exists at which the latter of the two derivative rights takes precedence of the duty to respect the exercise of the former by another state. If a country offers an indirect menace through a threatening disposition of its military force, and still more through clear indications of dangerous ambition or of aggressive intentions, and if at the same time its armaments are brought up to a pitch evidently in excess of the requirements of self-defence, so that it would be in a position to give effect to its intentions, if it were allowed to choose its opportunity, the state or states which find themselves threatened may demand securities, or the abandonment of the measures which excite their

PART I. fear, and if reasonable satisfaction be not given they may  
 CHAP. II. protect themselves by force of arms.

Rights of  
 property.

§ 9. The rights of a state with respect to property consist in the power to acquire territory, and certain other kinds of property susceptible of being held by it, in absolute ownership by any means not inconsistent with the rights of other states, in being entitled to peaceable possession and enjoyment of that which it has duly obtained, and in the faculty of using its property as it chooses and alienating it at will.

Theory  
 that the  
 rights of  
 a state  
 over its ter-  
 ritory, &c.  
 are not  
 strictly  
 proprietary  
 rights.

According to a theory which is commonly held, either the term property, when employed to express the rights possessed by a state over the territory occupied by it, must be understood in a different sense to that which is attached to it in speaking of the property of individuals, or else its use is altogether improper. Property, it is said, belongs only to individuals; a state as such is incapable of owning it; and though by putting itself in the position of an individual, it may hold property subject to the conditions of municipal law, it has merely in its proper state capacity either what is called an 'eminent domain' over the property of the members of the community forming it, in virtue of which it has the power of disposing of everything contained within its territory for the general good, or certain supreme rights, covering the same ground, but derived from sovereignty<sup>1</sup>. It cannot be denied that the immediate property which is possessed by individuals is to be distinguished for certain purposes from the ultimate property in the territory of the state, and the objects of property accessory to it, which is vested in the state itself. But these purposes are foreign to international relations. The distinction therefore, though it may be conveniently kept in mind for purposes of classification in dealing with the rules of

<sup>1</sup> Vattel, liv. i. ch. xx. § 235, 244, but see also liv. ii. ch. vii. § 81; Heffter, § 64; Bluntschli, § 277. Calvo (§ 169-70) distinguishes between the public and international aspects of the right of the state with reference to property, and recognises, as do also De Martens (*Précis du Droit des Gens Moderne de l'Europe*, § 72) and Riquelme (*Elementos de Derecho Público Internacional*, i. 23), the absolute character of the latter relatively to other states.

war, has no further place in international law. Its proper field is public law. As between nations, the proprietary character of the possession enjoyed by a state is logically a necessary consequence of the undisputed facts that a state community has a right to the exclusive use and disposal of its territory as against other states, and that in international law the state is the only recognised legal person. When a person in law holds an object with an unlimited right of use and alienation as against all other persons, it is idle to say that he does not legally possess complete property in it. Internationally, moreover, a full proprietary right on the part of the state is not only a reasonable deduction of law, but a necessary protection for the proprietary rights of the members of a state society. The community and its members, except in their state form, being internationally unrecognised, any rights which belong to them must be clothed in the garb of state rights before they can be put forward internationally. A right of property consequently, in order to possess international value, must be asserted by the state as a right belonging to itself.

A misapprehension of like kind is sometimes met with in regard to the right of alienation, the exercise of which is said to be subject to the tacit or express consent of the population inhabiting the territory intended to be alienated. The doctrine appears in two forms, a moderate and an extreme one. In its more moderate shape it appears to come to little more than a denial that title by cession is complete when the ceded territory has been handed over by the original owner to the new proprietor, peaceable submission by the inhabitants being necessary to perfect the right of the latter; but it is occasionally declared that the cession of land cannot be dissociated from that of the people who live and enjoy their political rights upon it, that 'a people is no longer a thing without rights and without will,' that its consent, if not otherwise proclaimed, must be testified by a vote of the population or its representatives, and that international law has adopted this principle by its practical recognition in the

PART I.  
CHAP. II.

Alleged  
limitation  
upon the  
right to  
alienate.

PART I.  
CHAP. II.

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treaty of Turin, which regulated the cession of Savoy to France, in the treaty of London, by which the Ionian Islands were ceded to Greece, in the treaty of Vienna, which stipulated for the eventual cession of Venetia to Italy, and in that portion of the treaty of Prague which referred to Northern Slesvig<sup>1</sup>. For an answer to this doctrine in its extreme form it is only necessary to traverse the allegation of fact. The principle that the wishes of a population are to be consulted when the territory which they inhabit is ceded has not been adopted into international law, and cannot be adopted into it until title by conquest has disappeared. The pretension that it was sanctioned by the treaties cited has an air rather of mockery than of serious statement when the circumstances accompanying the cession of Savoy and Nice are remembered, and when the only treaty of the number, the breach of which opportunity and desire combined to render possible, remained unobserved and has finally been cancelled. As to the milder form of the doctrine, it is only to be said that states being the sole international units, the inhabitants of a ceded territory, whether acting as an organised body or as an unorganised mass of individuals, have no more power to confirm or reject the action of their state than is possessed by a single individual. An act, on the other hand, done by the state as a whole is, by the very conception of a state, binding upon all the members of it.

Rights of  
independence.

§ 10. Independence is the power of giving effect to the decisions of a free will, in so far as absence of restraint by other persons is concerned. The right of independence therefore, in its largest extent, is a right possessed by a state to exercise its will without interference on the part of foreign states in all matters and upon all occasions with reference to which it acts as an independent community<sup>2</sup>, and so taken it

<sup>1</sup> Bluntschli, § 286; Calvo, § 181.

<sup>2</sup> A state is capable of occupying the position of a private individual within foreign jurisdiction, as for example in the case of England, which holds shares in the Suez Canal Company.

would embrace the rights of preserving and developing existence which have been already spoken of. But it is more convenient to include those rights only which a state possesses, not in respect of its existence as a living and growing being, but in a more limited aspect as a being exercising its will with direct reference either to other states or to persons and things within the sphere of its legitimate control.

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CHAP. II.

The former of these branches of the rights of independence gives rise to no special usages. It merely secures to a state with respect to other states a general liberty of action within the law as defined by the other rights and by the duties of a state. A state is enabled to determine what kind and amount of intercourse it will maintain with other countries, so long as it respects its social duties, and by what conditions such intercourse shall be governed; it is permitted to form relations of alliance or of special friendship; it may make contracts containing any provisions not repugnant to the law; and it may demand and exact reparation for acts done by other states which it may consider to be wrongs.

Rights  
of inde-  
pendence  
directly  
affecting  
other  
states.

The second branch comprehends a group of rights which go by the name of rights of sovereignty. The state community, in virtue of the supremacy of its common will over that of its individual members for the ends contemplated by it as a political society, puts them under obligations by its political, civil, and criminal legislation, which are not only exclusive of all other like obligations within the national territory, but are not necessarily extinguished as between them and their own state, when they enter a foreign country or some place not under the jurisdiction of any power. And it being a necessary result of independence that the will of the state shall be exclusive over its territory, it also asserts authority as a general rule over all persons and things, and decides what acts shall or shall not be done, within its dominion. It consequently exercises jurisdiction there, not only with respect to the members of its own community and their property, but with respect to foreign persons and

Rights  
of sove-  
reignty.

PART I.  
CHAP. II.  
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property. But as jurisdiction over the latter is set up as a consequence of their presence upon the territory, it begins with their entrance and ceases with their exit, so that it cannot, except in a particular case to be mentioned later<sup>1</sup>, be enforced when they have left the country; and with respect to acts done by foreign persons, it can only be exercised with reference to such as have been accomplished, or at least begun, during the presence within the territory of the persons doing them<sup>2</sup>. In principle, then, the rights of sovereignty give jurisdiction in respect of all acts done by subjects or foreigners within the limits of the state, of all property situated there, to whomsoever it may belong, and of those acts done by members of the community outside the state territory of which the state may choose to take cognizance.

In practice however jurisdiction is not exercised in all these directions to an equal extent.

Sove-  
reignty in  
relation to  
the sub-  
jects of  
the state.

The authority possessed by a state community over its members being the result of the personal relation existing between it and the individuals of which it is formed, its laws travel with them wherever they go, both in places within and without the jurisdiction of other powers. A state cannot enforce its laws within the territory of another state, but its subjects remain under an obligation not to disregard them, their social relations for all purposes as within its territory are determined by them, and it preserves the power of compelling observance by punishment if a person who has broken them returns within its jurisdiction. Thus the subjects of a state are not freed by absence from their allegiance; the fact of their legitimacy or illegitimacy if they are born abroad, the date at which they attain majority, the conditions of marriage and divorce, are determined by the state so far as their effects within its own dominions are concerned; if they commit crimes they can be arraigned before the tribunals of their

<sup>1</sup> See § 80.

<sup>2</sup> For an exception made by the practice of some states, see § 62.

country notwithstanding that they may have been already punished elsewhere.

PART I.  
CHAP. II.

Logically, the principle of the exclusive force of the corporate will within state territory would lead to the possession of an identical authority over foreigners and members of the state community during such time as the former remain in the country, in respect of all acts done by them there, of relations set up between them and other persons, and of duties owed to the state; while correlatively to such duties they would temporarily have the same rights as natural born subjects. But international usage does not allow the effects of the principle to be pushed so far. Its application receives limitations which are partly necessitated by that respect for the rights of other states over their members which is legally compulsory under the principle that a state must respect in others the rights with which it is itself invested, and which have partly grown out of unwillingness to extend to foreigners the full benefits enjoyed by subjects. Existing law stops short of the point of temporarily converting the subject of another state into a member of the community. Until a foreigner has made himself by his own act a subject of the state into which he has come, he has politically neither the privileges nor the responsibilities of a subject. His allegiance to his own state is recognised as being intact, and he cannot be obliged either to do anything inconsistent with it, or to render active service to the state under the control of which he momentarily is. On the other hand, he has no claim upon it for protection or good treatment except as a member of his own state, and to the extent that it has a right to demand. He is merely a person who is required to conform himself to the social order of the community in which he finds himself, but who is politically a stranger to it, obliged only to the negative duty of abstaining from acts injurious to its political interests or contrary to its laws. By accepted international law, therefore, a state has only the right of subjecting foreigners to such general or

Sovereignty in relation to subjects of foreign powers.



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CHAP. II.  
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special political and police regulations as it may think fit to establish; of making them share in those public burdens which are not attached to the status of subject or citizen; of rendering them amenable to its ordinary criminal jurisdiction; of placing all contentious matters in which they may be engaged under the cognizance of its own courts; and, subject to the qualification to be made immediately, of declaring that in contracts which are made, or to which it is asked that effect shall be given, within the state, and in matters connected with property existing within it, their competence, as well as the formalities requisite to give legal effect to their acts, shall be determined by the laws of the country<sup>1</sup>.

Private international law.

The rights over foreigners and their property which are thus left to a state in strict law are further limited in practice by derogations which states are in the habit of voluntarily making from them. Modern legislation, in dealing with purely private relations between individuals, is more anxious to give effect to those relations as they really are, or as it is conceived that they ought to be, than to affirm the exclusiveness of the rights of sovereignty; and there are many cases in which this object is best attained by allowing the law of

<sup>1</sup> Grotius, de Jure Belli et Pacis, lib. ii. c. xi. § 5; Wolff, Jus Gentium, § 301; Vattel, liv. ii. ch. viii. § 101, 107-8; de Martens, Précis, § 83; Twiss, i. § 150-2; Bluntschli, § 388, 391; Calvo, § 251-2. Portalis (quoted by Phillimore) puts the general principle of the submission of strangers to the authority of a foreign state as follows:—'Chaque état a le droit de veiller à sa conservation, et c'est dans ce droit que réside la souveraineté. Or comment un état pourrait-il se conserver et maintenir s'il existait dans son sein des hommes qui pussent impunément enfreindre sa police et troubler sa tranquillité. Le pouvoir souverain ne pourrait remplir la fin pour laquelle il est établi, si des hommes étrangers ou nationaux étaient indépendants de ce pouvoir. Il ne peut-être limité, ni quant aux choses, ni quant aux personnes. Il n'est rien s'il n'est tout. La qualité d'étranger ne saurait être une exception légitime pour celui, qui s'en prévaut contre la puissance publique qui régit le pays dans lequel il réside. Habiter le territoire, c'est se soumettre à la souveraineté.' It is evident from what is said above that this language requires some qualification. Some writers make the unnecessary supposition that 'an individual in entering a foreign territory binds himself by a tacit contract to obey the laws enacted by it, for the maintenance of the good order and tranquillity of the realm.' Phillimore, i. § cccxxii.

the country to which a foreigner belongs to operate in lieu of the territorial law when the two are in conflict. The concessions or relaxations of sovereign rights which it has become customary for civilised nations to make for these reasons have given rise to a body of usage of considerable bulk, called private international law. Private international law is not however a part of international law proper. The latter, as has been seen, is concerned with the relations of states; in so far as individuals are affected, they are affected only as members of their state. Private international law consists in rules by which states consent to guide their conduct in dealing with foreign individuals not as members of their state, but simply as persons whose private relations can in the opinion of the state exercising jurisdiction be best regulated by observance of these rules. In the following work, therefore, private international law will not be touched upon.

§ 11. The exclusive force possessed by the will of an independent community within the territory occupied by it is necessarily attended with corresponding responsibility. A state must not only itself obey the law, but it must take reasonable care that illegal acts are not done within its dominions. Foreign nations have a right to take acts done upon the territory of a state as being *primâ facie* in consonance with its will; since, where uncontrolled power of effective willing exists, it must be assumed in the absence of proof to the contrary that all acts accomplished within the range of the operation of the will are either done or permitted by it. Hence it becomes necessary to provide by municipal law, to a reasonable extent, against the commission by private persons of acts which are injurious to the rights of other states, and to use reasonable vigour in the administration of the law so provided.

A second duty arising out of the right of independence is that of respecting the independence of others. As has already been said, a state has entire freedom of external and internal action within the law. To interfere with it therefore is a

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CHAP. II.  
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wrong, unless it can be shown that there are rights or duties which have priority, either invariably or under certain circumstances, over the duty of respecting independence.

Priority of the right of self-preservation over the foregoing duty.

That there is one such right is incontestible. Even with individuals living in well-ordered communities the right of self-preservation is absolute in the last resort. *A fortiori* it is so with states, which have in all cases to protect themselves. If the safety of a state is gravely and immediately threatened either by occurrences in another state, or aggression prepared there, which the government of the latter is unable, or professes itself to be unable, to prevent, or when there is an imminent certainty that such occurrences or aggression will take place if measures are not taken to forestall them, the circumstances may fairly be considered to be such as to place the right of self-preservation above the duty of respecting a freedom of action which must have become nominal, on the supposition that the state from which the danger comes is willing, if it can, to perform its international duties.

Whether any other right or duty has such priority.

Whether there is any other right or duty which has priority of the right of independence so long as a state endeavours, or professes that it endeavours, to carry out its strictly international duties is, to say the least of it, eminently doubtful, especially considering that no guarantees exist tending to limit the occurrence of such interference to due occasions, or to secure that it shall be used only for its ostensible objects. The subject will be touched upon elsewhere.

Right of states to repress or punish violations of law.

§ 12. When a state grossly and patently violates international law in a matter of serious importance, it is competent to any state, or to the body of states, to hinder the wrong-doing from being accomplished, or to punish the wrong-doer. Liberty of action exists only within the law. The right to it cannot protect states committing infractions of law, except to the extent of providing that they shall not be subjected to interference in excess of the measure of the offence; infractions may be such as to justify

remonstrance only, and in such cases to do more than remonstrate is to violate the right of independence. Whatever may be the action appropriate to the case, it is open to every state to take it. International law being unprovided with the support of an organised authority, the work of police must be done by such members of the community of nations as are able to perform it. It is however for them to choose whether they will perform it or not. The risks and the sacrifices of war with an offending state, the chances of giving umbrage to other states in the course of doing what is necessary to vindicate the law, and the remoter dangers that may spring from the ill-will produced even by remonstrance, exonerate countries in all cases from the pressure of a duty.

§ 13. Of the duties which flow directly from the possession by states of a moral nature, one only, viz. that of good faith, can probably be said to have acquired a legal value. In recognising the binding force of contracts, law takes it up and includes it in itself. But there can be little question that all other duties, which are independent of the legal principles already stated, remain in the stage of purely moral obligations. There are but two, both arising out of the duty of sociability, which can at all be said to put in a serious claim to fall within the boundaries of law.

It is not uncommonly said that nations have a right to maintain intercourse, if it so pleases them, with other nations; that an entire refusal on the part of a state to allow of intercourse, by being a denial of a fundamental legal obligation, is a renunciation of the advantages of international law, so that a nation becomes an outlaw by isolating itself; and that in particular the innocent use of the land and water communications within the territory of a state cannot be withheld from other states, and the privilege of trade in articles of necessity cannot be refused<sup>1</sup>. The doctrine is no doubt limited by

<sup>1</sup> Heffter, § 26 and 33; Grotius, *De Jure Belli et Pacis*, liv. ii. ch. ii. § 13; Bluntchli, p. 26.

The doctrine is at least an old one. Franciscus a Victoria (*Relectiones*

Moral  
duties of  
states.  
Duty of  
good faith.

Alleged  
legal duty  
of a state  
to permit  
commer-  
cial and  
other inter-  
course to  
be main-  
tained with  
it by  
foreign  
countries.

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CHAP. II.  
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the qualification that a state may take what measures of precaution it considers needful to prevent the right of access and intercourse from being used to its injury, and may subject foreigners and foreign trade to regulation in the interest either of its own members or of states which it wishes to favour. In the last resort however there would still remain a right taking priority of the rights of independence and property, and capable of being enforced, if broken, by war. Of the working of such a right, if it existed, there would be deep traces in both law and history. In law however it cannot be pretended that any definite usages are to be referred to it, except those of the freedom of territorial seas to navigation and of the opening of rivers to coriparian states. The former can be accounted for as readily by the absence of any wish to interfere with harmless navigation as by the recognition of a right; and the latter will be seen later to be destitute of an authoritative character. The evidence of history is still less favourable. States formerly claimed a right of innocent passage for military purposes. But this, so far from governing the rights of independence, has long been recognised to be subordinate both to them and to the duties of neutrality which are founded on them. In other directions there is no trace of the operation of the supposed right. It is true that the interest which every country has in trade prevents the questions from arising which might be produced by total or by almost complete seclusion; but if so wide-reaching a right had been admitted at all as an operative rule of law, the occasions for its employment adversely to foreign states would neither have been few nor insignificant.

Alleged  
legal duty  
of extra-  
diting  
criminals.

It is also alleged that states have a right to require that persons accused of crime, who have escaped into a foreign country, shall be delivered up for trial and punishment on

Theologicae, Relect. v. sect. iii. 2) argued that the Spaniards had a right to go and live in the Indies because it has been the custom from the beginning of the world for any one to go into whatever country he chooses, and prohibition of entrance is a violent measure not far removed from war.

conviction. Authority is much divided on the matter; but there appears on the whole to be a distinct preponderance of opinion against the existence of the right, and the weight of argument unquestionably leans in the same direction. Sometimes it is said that crimes, or at least the more serious crimes, are not merely an infraction of a command which a particular society chooses to give; they sap the foundations of social life, they are an outrage upon humanity at large, and all human beings therefore ought to contribute to repress them. More commonly it is said that all nations have a common interest in the repression of crime, that its commission is encouraged when a criminal enjoys immunity so soon as he leaves the territory of his country, and that in order to secure reciprocity states must give up criminals at the demand of their neighbours. The latter views are just, but it is difficult to connect them with a duty of extradition. An obligation to do an act for the benefit of another person cannot be founded on a demonstration that to perform it will be advantageous to the doer. The former argument, on the other hand, goes too far. It implies that international law commands human beings to combine for the repression of everything which is grossly injurious to the bases of social life. This evidently it does not do; and as a matter of fact, even in the particular question of extradition, states have been far from acknowledging a duty of giving up criminals. They have treated their surrender as an act of comity when it has been effected apart from convention; and they have in recent times provided internationally for the exercise of justice by express agreements. Positive international law therefore does not recognise the duty of extradition; in other words, assuming international law to be what it was stated to be in the Introduction, the duty of extradition cannot exist<sup>1</sup>.

<sup>1</sup> The chief authorities on either side are enumerated by Foelix, *Droit International Privé*, liv. ii. tit. ix. ch. vii. Among recent authors, Sir R. Phillimore (i. § ccclxiv), Woolsey (§ 79), and Bluntschli (§ 395), deny that extradition is obligatory. Fiore (*Le Nouveau droit International*, 1<sup>me</sup> partie, ch. x), and to a certain

## PART I.

## CHAP. II.

Duties of  
courtesy.

By many writers the ceremonial rules which regulate the forms of state relations are included in international law. They conceive that the feelings of honour and personal dignity possessed by states not only prompt a wish that the existence of those feelings shall be recognised by other states, but confer a legal right to demand external manifestations of recognition. To the English mind the elevation of courtesy, and of observance of the etiquette which is its formal expression, into a legal duty is not easily comprehensible. The most that can be said of them is that an intentional breach of ceremonial rules is an offensive act, and that an offensive act is inconsistent with the comity which exists between friendly nations ; but their disregard gives no right to exact reparation by force, or to take any further measures, if reparation be denied, than to return discourtesy with discourtesy, or to withdraw from actively friendly intercourse<sup>1</sup>.

Insuscepti-  
bility of  
the open  
sea to be  
appropri-  
ated as  
property.

§ 14. It being recognised that states are unable to maintain effective control over large spaces of sea, so as to be able to reserve their use to themselves, it is a principle of international law that the sea is in general insusceptible of appropriation as property. The qualifications by which the application of this principle is limited will be examined later.

extent Calvo (§ 377), hold it to be so. The latter author (§ 379-420) gives a very full account of the treaties on the subject, and of practice independently of treaties.

<sup>1</sup> International ceremonial rules have reference to—

1. The direct relations of sovereigns with each other.
2. Diplomatic correspondence.
3. The intercourse of official persons with each other.
4. Maritime ceremonial.

Ample information with respect to them will be found in Heffter (§ 194-7), Calvo (§ 133-65), or Klüber (*Droit des Gens Moderne de l'Europe*, § 89-122).

## CHAPTER III.

### GENERAL PRINCIPLES OF THE LAW GOVERNING STATES IN THE RELATION OF WAR.

§ 15. WHEN differences between states reach a point at which both parties resort to force, or one of them does acts of violence which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other until one of the two has been brought to accept such terms as his enemy is willing to grant.

PART I.  
CHAP. III.  
In what  
the rela-  
tion of war  
consists.

§ 16. As international law is destitute of any judicial or administrative machinery, it leaves states, which think themselves aggrieved, and which have exhausted all peaceable methods of obtaining satisfaction, to exact redress for themselves by force. It thus recognises war as a permitted mode of giving effect to its decisions. Theoretically therefore, as it professes to cover the whole field of the relations of states which can be brought within the scope of law, it ought to determine the causes for which war can be justly undertaken; in other words, it ought to mark out as plainly as municipal law what constitutes a wrong for which a remedy may be sought at law. It might also not unreasonably go on to discourage the commission of wrongs by investing a state seeking redress with special rights and by subjecting a wrong-doer to special disabilities.

The place  
of war in  
interna-  
tional law.

The first of these ends it attains to a certain degree, though very imperfectly. It is able to declare that under certain circumstances a clear and sufficiently serious breach

How far in-  
ternational  
law defines  
just causes  
of war.



PART I. of the law, or of obligations contracted under it, takes place.  
 CHAP. III.

But in most of the disputes which arise between states the grounds of quarrel, though they might probably be always brought into connection with the wide fundamental principles of law, are too complex to be judged with any certainty by reference to them; sometimes again they have their origin in divergent notions, honestly entertained, as to what they consist in, and consequently as to the injunctions of secondary principles by which action is immediately governed; and sometimes they are caused by collisions of naked interest or sentiment, in which there is no question of right, but which are so violent as to render settlement impossible until a struggle has taken place. It is not therefore possible to frame general rules which shall be of any practical value, and the attempts in this direction, which jurists are in the habit of making, result in mere abstract statements of principles, or perhaps of truisms, which it is unnecessary to reproduce<sup>1</sup>.

The legal position of parties to a war relatively to each other.

The second end international law does not even endeavour to attain. However able law might be to declare one of two combatants to have committed a wrong, it would be idle for it to affect to impart the character of a penalty to war, when it is powerless to enforce its decisions. The obedience which is paid to law must be a willing obedience, and when a state has taken up arms unjustly it is useless to expect it to acquiesce in the imposition of penalties for its act. International law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation. Hence both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights<sup>2</sup>.

<sup>1</sup> Ayala, *De Jure et Officiis Bellicis*, lib. i. c. ii. § 34; Grotius, *De Jure Belli et Pacis*, lib. i. c. iii. § 4, and lib. iii. c. iii. § 1, and c. iv; Vattel, liv. iii. ch. xii. § 190-2; De Martens, *Précis*, § 265; Halleck, i. 472.

<sup>2</sup> The conditions under which war is just are largely explained by Grotius

§ 17. The use of violence by a country towards its enemy necessarily suspends the full observance of the right to the enjoyment of independence and of the continuance and development of existence, which a state possesses when in its normal relation to others. Except in so far also as the right to use violence may be limited by something external both to itself and to any of the rights over which it thus has a necessary precedence, it is incompatible with a secure enjoyment of the rights of property. The more important therefore of the definite rights belonging to states in their normal relation to each other are governed by the right to use violence for a specific end. The temporary and exceptional right supplants for the moment the permanent rights. But just as violence in war has at no time of modern European history been in fact exercised without the encumbrance of moral restraint, so theoretically it must always be exercised with due regard to the character of the state as an aggregate composed of moral beings. It is agreed that the use of wanton and gratuitous violence is not consistent with the character of a moral being. When violence is permitted at all, the amount which is permissible is that which is necessary to attain the object proposed. The measure of the violence which is permitted in war is therefore that which is required to reduce the enemy to terms<sup>1</sup>. It is of course evident that this amount is conceivably variable, that greater or less violence might be regarded as necessary according to the degree of obstinacy shown by the enemy, and that in the absence of specific rules, applying the general principle,

PART I.  
CHAP. III.

Limits of  
the right  
to use  
violence  
in war.

(lib. ii. c. i. and xxii-vi), Pufendorf (bk. viii. c. vi. § 3), Wolff (Jus Gent. § 617-46), Vattel (liv. iii. ch. iii), Halleck (ch. xv), and Fiore (ii. 238); and are more shortly noticed by Franciscus à Victoria (Relect. Theol. vi), Ayala (lib. i. c. ii. § 12), Albericus Gentilis (De Jure Belli, lib. i. c. iii), De Martens (Précis, § 265), and Klüber (§ 237). Heffter (§ 113) properly characterises discussions upon the subject as 'oiseuses.' The doctrine of M. Bluntschli (§ 515-8) must be exempted from the charge of being truistic, whatever may be the criticism to which it is exposed on other grounds.

<sup>1</sup> Grotius, lib. iii. c. i. § 2; Vattel, liv. iii. c. viii. § 136-8; Lampredi, Juris Publici Universalis Theoremata, pars iii. c. xiii. § 1-5; Heffter, § 119.

PART I.  
CHAP. III.  
—

a latitude might be given to belligerent action which would reduce the principle to impotence. At this point usage steps in, and provides from time to time standards of permissible violence for universal application. The differences in the kind and degree of resistance which can be offered by civilised nations to an enemy are not considered to be such as to justify differences in the kind of violence employed to subdue it. In all wars consequently the same means of putting stress upon an adversary must be employed, save in rare cases when, by himself overstepping the prescribed bounds, the latter makes it necessary or allowable to adopt exceptional measures with respect to him.

In what  
international law  
as applied  
to war  
consists.

International law as applied to war thus consists in customary rules by which the maximum of violence which can be regarded as necessary at a given time is determined. These rules, though sufficiently ascertained at any particular moment to afford a test of the conduct of a state, have been, and still are, changing gradually under the double influence of the growth of humane feeling and of the self-interest of belligerents. Springing originally from limitations upon a right, which in its extreme form constitutes a denial of all other rights, and developed through the action of practical and sentimental considerations, the law of war cannot be expected to show a substructure of large principles, like those which underlie the law governing the relation of peace, upon which special rules can be built with fair consistency. It is, as a matter of fact, made up of a number of usages which in the main are somewhat arbitrary, which are not always very consistent with one another, and which do not therefore very readily lend themselves to general statements. So far as any connection between them exists, it can be indicated sufficiently, and more conveniently than here, when the various usages are separately discussed.

The doctrine that the relation of war does not affect

§ 18. In what has just been said it has been taken for granted that a certain doctrine is not part of international law, which is declared by many writers to be of incontestable authority,

which, if it is really accepted, constitutes a fundamental principle of the laws of war, and which, if carried out to its natural results, would deeply modify the rules by which belligerents are actually guided. A doctrine of such pretension must be examined, and if it is groundless, must be shown to be so, before the special rules affecting war can be satisfactorily treated.

PART I.  
CHAP. III.

individuals,  
except in  
so far as  
they con-  
tribute to  
the pro-  
secution of  
hostilities.

The doctrine in question starts with the admitted fact that international law is concerned only with the relations of states, and that war is consequently 'a relation of a state to a state, and not of an individual to an individual.' The individual, so far as he is affected at all, is affected only through his state. But individuals, it is said, occupy a double position. In one respect they are private persons, with rights of property and person which have no relation to state life; and in another they are members of the state, from whom it derives its means of carrying on war, and whom it employs as its agents. These two aspects correspond, according to the theory, to a substantial distinction; to which some writers give effect by supposing an individual to be an enemy only while actually fighting for his country, and others by regarding him as such to the extent only that he is in the service of his state, or that he contributes to enable it to sustain hostilities. Both consider that in all matters outside one or other of these lines he is a stranger to the war in person and property.

In opposition to this doctrine is another, which also takes as its basis that international law is concerned only with the relations of states. War is a relation between states alone. But states being the only subjects of international law, that law takes cognizance of the individual solely through his state, and as belonging to it, so that except as a member of it he has neither personal nor proprietary rights. Thus for good and for evil he is wholly identified with it, and when war is declared he becomes the enemy of the enemy state and of every person belonging to it.

PART I.  
CHAP. III.

It is claimed on behalf of the former theory, not only that it furnishes an admitted principle to modern international law, but that it is in fact applied in many of the actual rules of war, and that many of the improvements by which modern law is distinguished from the older customs are due to it.

Whether  
the doc-  
trine is  
supported  
by the au-  
thority—  
(1) of  
writers;

In the first hundred and seventy years of the existence of international law as a system, the notion of the separability of the individual from his state for the purposes of war was unknown to international jurists. To all it was a matter of course that the subjects of an enemy state were themselves individually enemies<sup>1</sup>. It was not till 1801 that the theory of the exclusion of private persons as such from the hostile relations of the states to which they belong began to find its way into international law. In that year Portalis, in a speech delivered on opening the French Prize Court, said that 'war is a relation of state to state, and not of individual to individual. Between two or more belligerent nations the private persons of whom those nations are composed are only enemies by accident; they are not so as men, they are not even so as citizens, they are so only as soldiers<sup>2</sup>.' The

<sup>1</sup> Grotius, lib. iii. c. iii. § 9, and c. iv. § 8; Pufendorf, bk. viii. ch. vi; Molloy, *De Jure Maritimo*, bk. i. ch. i. § 22; Bynkershoek, *Quæst. Jur. Pub.* lib. i. c. i; Burlamaqui, *The Principles of Natural and Politic Law*, Trans. by Nugent, vol. ii. pt. iv. ch. iv. § 20; Wolff, *Jus Gent* § 721 and 723; Vattel, liv. iii. ch. v. § 70-2; Lampredi, *Jur. Pub. Theorem.* pars iii. c. xii. § 10. See also the judgment of Mr. Justice Johnson in the case of the *Rapid*, viii Cranch, 160-2.

<sup>2</sup> Portalis borrowed his doctrine almost textually from Rousseau. '*La guerre*,' says the latter, '*n'est point une relation d'homme à homme, mais une relation d'état à état, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes, ni même comme citoyens, mais comme soldats; non point comme membres de la patrie, mais comme ses défenseurs. Enfin chaque état ne peut avoir pour ennemis que d'autres états, et non pas des hommes, attendu qu'entre choses de diverses natures on ne peut fixer aucun vrai rapport.*' He goes on to make the startling assertion that '*ce principe est même conforme aux maximes établies de tous les temps et à la pratique constante de tous les peuples policés.*' *Contrat Social*, liv. i. ch. iv.

With an admirable irony, of which it is hard to suppose him unconscious, Talleyrand wrote to Napoleon in 1806:—'*Trois siècles de civilisation ont donné à l'Europe un droit des gens que, selon l'expression d'un écrivain illustre, la nature humaine ne saurait assez reconnaître. Ce droit est fondé sur le*

doctrine did not immediately spread. De Martens, Klüber, Kent, Wheaton, and Manning expressly or implicitly manifested their adherence to the traditional view; and an opinion which is supported by their authority may be regarded as the established law of the earlier part of the present century<sup>1</sup>. Their example has more recently been followed by Riquelme, Twiss, Phillimore, Halleck, and Negrin<sup>2</sup>. On the other hand, the ideas of Rousseau have undoubtedly become a commonplace of most of the recent

PART I.  
CHAP. III.

*principe que les nations doivent se faire dans la paix le plus de bien, et dans la guerre le moins de mal qu'il est possible.*

*'D'après la maxime que la guerre n'est point une relation d'homme à homme, mais une relation d'état à état, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes, non pas même comme membres ou sujets de l'état, mais uniquement comme ses défenseurs, le droit des gens ne permet pas que le droit de guerre et le droit de conquête qui en dérive, s'étendent aux citoyens paisibles et sans armes, aux habitations et aux propriétés privées, aux marchandises de commerce, aux magasins qui les renferment, aux chariots qui les transportent, aux bâtiments non armés qui les voient sur les rivières ou sur les mers, en un mot à la personne et aux biens particuliers.*

*'Ce droit, né de la civilisation, en a favorisé les progrès. C'est à lui que l'Europe a été redevable du maintien et de l'accroissement de prospérité, au milieu même des guerres fréquentes qui l'ont divisée,' &c. Quoted by Heffter (note to § 119) from the Moniteur of Dec. 5, 1806.*

The wars of Napoleon were hardly conducted in the spirit of this passage, which indeed may be suspected to have been only written for the purpose of casting odium upon the power which captured French ships, and upon which France was unable to retaliate.

<sup>1</sup> De Martens, *Précis*, § 263; Klüber, § 232; Kent, *Comm.* i. 55; Wheaton, *Elem.* pt. iv. ch. i. § 6; Manning, *Commentaries on the Law of Nations* (ed. 1875) p. 166.

<sup>2</sup> Riquelme, lib. i. c. 10; Twiss, ii. § 42; Phillimore, iii. § lxi; Halleck, i. 480; Negrin, *Tratado Elemental de Derecho Internacional Marítimo*, 141. The deliberate view of the government of the United States is shown by the 20th and 21st articles of the 'Instructions for the Government of Armies in the Field,' in which it is laid down that 'Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilised existence that men live in political, continuous societies, forming organised units, called states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.' See also, for the doctrine of the American Courts, *White v. Burnley*, xx Howard, 249.

PART I. continental writers<sup>1</sup>; but however valuable the opinion of  
 CHAP. III. some of these may be, it would be idle to put them in competition with the mass and continuity of authorities which are arrayed against them, unless it could be shown that practice has clearly anticipated their decision, or that it has recently changed to accommodate itself to their views.

(2) of usage. Is then existing usage reasonably consistent with the theory in question, or has any improvement in practice taken place which can fairly be attributed to its influence? If individuals are not enemies as men, if they are not so even as subjects of the state, if they are enemies as soldiers only, or at most as officials or tax-payers, an enemy can have no right to interfere with the civil organisation of the hostile country, he can have no right of doing violence directly or indirectly to civilians, he can have no right to touch a shilling of their property or to derange their daily life by using anything which belongs to them for military purposes, he can have no right to treat them in his own country in any respect less favourably than in time of peace<sup>2</sup>. Yet not a single modern war has

<sup>1</sup> For example, Bluntschli, *Introd.* p. 32 and § 530-1; Fiore, 11<sup>e</sup> p<sup>tes</sup>, ch. iii; De Laveleye, *Du Respect de la Propriété Privée*, p. 26.

It is to be wished that the advocates of the new doctrine were more sensible than they are of the necessity of offering some proof in support of their assertion that it has replaced the previously existing law. They simply take for granted that the latter is exploded. M. Pradier Fodéré, in his notes to Vattel (iii. 132, ed. 1863), uses typical language in speaking of it as the 'erreur si étrangement adoptée par Vattel, et dont le droit des gens du xix<sup>e</sup> siècle a fait justice.'

<sup>2</sup> What is said above need not be pressed so far as to exclude from the list of enemies any one in the employment of the state or actually aiding it in any way, and it is of course to be understood that the property of the state itself, including the money payable in respect of ordinary taxes as it becomes due, may be seized by the enemy; but, on the most liberal construction, the language of M. Portalis can lead to nothing less than this, and as the extract which has been given from his speech is repeated *ad nauseam* by the writers who follow him, it must be assumed to embody their views. M. Fiore indeed (ii. 270) says, 'Tant que les sujets des divers états ne prennent pas personnellement part au combat, leurs droits et leurs biens personnels ne peuvent pas souffrir à cause des opérations de la guerre, dont les effets sont limités aux droits et aux propriétés publiques des nations belligérantes.' M. Bluntschli (p. 33) may not seem to go so far; but if he does not intend to do so, he is inconsistent with his own opinion as expressed in § 530-1.



been made, except upon territory of which the population has been actively friendly to the invader, without every one of these things being done; and the pages of the writers who repeat the empty declamation of Portalis may be turned over in vain for a word which denies the right to do them. On entering his enemy's territory an invader replaces the civil government by military control, and makes any changes which are necessary for his safety and success; when he arrives before a fortress he not only bombards it without thought for the peaceable inhabitants, but he often directs his fire upon them and their houses instead of upon the fortifications, in order that the commander may be induced by their sufferings to surrender; the property of his enemy's subjects he seizes by way of contribution and requisition; he forces them to render him personal service in furtherance of his war; he destroys their buildings and cuts up their fields for military purposes; he stops farming work and the daily intercourse of the country by requisitioning carts and horses and monopolising the use of railways and canals; and during the continuance of the war he denies them the civil justice of his courts. Most of these and of similar acts, which are habitually done, are necessary to war, some of them are unnecessary; but all alike are incompatible with any reasonable application of the principle that individuals are not enemies.

If again it is urged that practice, to whatever extent it may fall below a theoretical standard, has at least been improved since the introduction of the doctrine, the answer is simple. From the middle of the seventeenth century the laws of war have been continuously softened with the growth of humanity; it would be hard, and probably impossible, to show that a more marked or rapid change has occurred during the present century than during a former period of equal length; and even if such a change could be established, it would be more rational to attribute it to a reaction from the excesses of the Napoleonic wars, to the influence of a long peace, and above all to the general softening of modern

Whether  
practice  
has been  
modified  
by the in-  
fluence of  
the doc-  
trine.



PART I. manners, than to a principle, which has been seen to be at  
 CHAP. III. variance with practice, which perhaps is not seriously adopted  
 even in theory except by writers in any country, and which  
 is certainly repudiated in England and the United States, the  
 inhabitants of which may justly claim not to have less than  
 the average amount of humane feeling.

Reasons  
 for regard-  
 ing the  
 doctrine  
 as ob-  
 jectionable.

There are two reasons for which it is satisfactory to be  
 able to reject the doctrine of the separability of the individual  
 from the state.

The first is that the doctrine is a fiction. International  
 law rests no doubt in great part upon fictions. But they  
 are fictions which have become in a sense realities by the  
 degree to which they have seized upon the imaginations of  
 peoples, and to which they have been acted upon for genera-  
 tions; in the main also they are antecedent to international  
 law; they may have been strengthened by it; but to begin  
 with they imposed themselves upon it. New fictions are  
 in a different position. As obvious unrealities they are desti-  
 tute of inherent force, and they consequently ought never  
 to be lightly introduced. In the present case it is impossible  
 to draw a real distinction between the public and private  
 aspects of the individual. The state is made up of the sum  
 of the individuals belonging to it, and its will is the sum of  
 their wills. It is by pressure of different kinds which is  
 brought to bear upon them individually that the state is  
 compelled to submit to a victor. To separate individuals  
 theoretically from the state in respect of a number of  
 interests, which are nevertheless recognised in universal  
 practice as giving a fair hold for putting stress upon it,  
 is simply to ignore facts. To separate the state from the  
 individuals which compose it is to reduce it to an intangible  
 abstraction.

The second reason is that the doctrine is mischievous.  
 It is the argumentative starting-point of attack upon the  
 right of capture of private property at sea. Whatever from  
 certain points of view may be the merits of this question, it

is inconvenient, to say the least of it, that the discussion as to the propriety of retaining the right should be placed upon a false basis, and that by the quiet assumption of an inadmissible principle the semblance of a justification should be obtained for branding a practice as an iniquitous contravention of rule, which in reality is in harmony with the ground principles of the laws of war. Still more objectionable is its effect upon the legal position of the inhabitants of a militarily occupied country. If they are not enemies they have no right of resistance to an invader; the spontaneous rising of a population becomes a crime; and the individual is a criminal who takes up arms without being formally enrolled in the regular armed forces of his state. The customs of war no doubt permit that such persons shall under certain circumstances be shot, and there are reasons for permitting the practice. But to allow that persons shall be intimidated for reasons of convenience from doing certain acts, and to mark them as criminals if they do them, are wholly distinct things. A doctrine is intolerable which would inflict a stain of criminality on the defenders of Saragossa<sup>1</sup>.

<sup>1</sup> In speaking upon this point, Baron Lambermont, one of the Belgian delegates at the Conference of Brussels, said, 'Il y a des choses qui se font à la guerre, qui se feront toujours, et que l'on doit bien accepter. Mais il s'agit ici de les convertir en lois, en prescriptions positives et internationales. Si des citoyens doivent être conduits au supplice pour avoir tenté de défendre leur pays au péril de leur vie, il ne faut pas qu'ils trouvent inscrits sur le poteau au pied duquel ils seront fusillés l'article d'un traité signé par leur propre gouvernement qui d'avance les condamne à mort.' Parl. Papers, Miscell. No. 1, 1875, p. 92. The efforts of some of the great military powers at the Conference to suppress the right of a population to defend itself were so sturdily resisted by several of the minor states that the draft rules originally proposed were modified, as a result of the discussion which took place, in a sense favourable to the right.

## CHAPTER IV.

### GENERAL PRINCIPLES OF THE LAW GOVERNING BELLIGERENTS AND NEUTRALS IN THEIR RELATIONS WITH EACH OTHER.

PART I.  
CHAP. IV.

How the  
special law  
of neu-  
trality has  
been  
formed.

§ 19. THE rudimentary propositions of international law contemplate no other relations than those of war and peace. At a time when the relations of countries in amity with one another were the subject of elaborate rule, and when the violence of war was already limited by definite customs, neutrality had no existence. If hostilities broke out between two states, every other was an ally or an enemy. Little by little a third attitude became recognised as possible and legitimate; and its maintenance has gradually been transformed into a duty by the jealousy of belligerents, whose anxiety to deprive their enemy of advantages which the preference of the neutrals might give to him has been helped by the equal anxiety of neutrals to continue their habits of trade and intercourse. A code of rules has grown up affecting states in their new relations, which in part is the accidental result of the immediate collision of interests of various strength, in part is a fair deduction from the principles of the law governing states in their normal relations, and in part represents a compromise between conflicting deductions from those principles and from the rights which belligerents are conceived to possess as against their enemies. As these last-mentioned principles and rights are equally starting-points in law, and as they contemplate the contra-

dictory states of war and peace, and have no inherent reference to any third relation in which countries can stand to one another, any compromise arrived at between them may be expected to be rough. As a matter of fact, not only is the usage which governs the conduct of neutrals and belligerents often inconsistent with itself, but there are even two broadly divided tendencies of opinion as to its right basis, of which one prefers the interests of the neutral and the other those of belligerents.

However unfortunate the existence of these divergent tendencies may be, they are equally defensible theoretically on the fundamental principles with which the law of neutrality is bound to conform; and as it is beyond the province of the international lawyer to settle precedence between the interests of neutrals and belligerents, he must leave to moralists and to statesmen the task of deciding which of the two are the more worthy of encouragement, and therefore which theoretic tendency is to be preferred.

§ 20. It is a reasonable, and indeed a necessary, deduction from the principle that a state is bound to respect the right of free action possessed by other states that it must not allow feelings of friendship for a country to betray it into embarrassing an enemy of the latter in the exercise of his legitimate rights of war. It has been mentioned as an incident of sovereignty that every people possessing sovereignty has the right of determining what kind and amount of intercourse it will maintain with foreign nations, and that it may choose to mark out one as an object for greater friendship than another. In time of peace it is easy to accord such preference, and to remain, nevertheless, on terms of perfect amity with less favoured countries. But during war, privileges tending to strengthen the hands of one of two belligerents help him towards the destruction of his enemy. To grant them is not merely to show less friendship to one than the other; it is to embarrass one by reserving to the other a field of action in which his enemy

The rudimentary principle of the law of neutrality. Duty of impartial conduct.

PART I. cannot attack him; it is to assume an attitude with respect  
 CHAP. IV. to him of at least passive hostility. If therefore a people  
 desires not to be the enemy of either belligerent, its amity  
 must be colourless in the eyes of both; in its corporate  
 capacity as a state it must abstain altogether from mixing  
 itself up in their quarrel.

In the oldest and most rudimentary form of the theory  
 of neutrality this principle was fully recognised. But when  
 once its dictates had been satisfied, the duties of a state were,  
 for all practical purposes, supposed to end.

Territorial  
 sove-  
 reignty as  
 a source  
 of neutral  
 responsi-  
 bility.

§ 21. Gradually, as the theory of neutrality was worked  
 out, it came to be thought that a neutral state is not merely  
 itself bound to refrain from helping either of two belligerents,  
 but that it is also bound to take care to a reasonable extent  
 that neither one nor the other shall be prejudiced by acts  
 over which it is supposed to have control. States become  
 affected by the duty of responsibility which is correlative  
 to the fact of sovereignty. Sovereign states being in pos-  
 session of the sole right to decide what acts shall or shall  
 not be openly done within their territory, all countries are  
 supposed to be jealous of any infringement of that right;  
 and no stranger being able to look behind the fact of  
 sovereignty, they are supposed to be capable of securing  
 that it shall be respected. It would neither be likely nor  
 is it found to be the fact that nations, in matters connected  
 principally with their own interests, regard with patience  
 any exercise of authority or of force within their territories  
 independently of their own sanction. If therefore a people  
 is found to acquiesce in conduct injurious to its friends;  
 if it permits a belligerent to use its lands or its harbours as  
 the scene of hostile action, or the basis of hostile preparation,  
 a violent presumption is raised that its neutrality is unreal,  
 and that it deliberately intends under the mask of equal  
 friendship to help the belligerent who has committed an  
 unpunished offence.

The reasoning which applies to strangers applies also to

subjects. As the presumption that a sovereign has control over avowed acts done within his dominions is still stronger in the case of subjects than of foreigners, if any acts are done by them which are in opposition to his declared policy, it is easier to believe the declaration to be false than the power to be inadequate. *Prima facie* everything which they do is permitted by him.

On the other hand, it is admitted that no government can exercise an inquisitorial surveillance over all the doings of persons living within its jurisdiction. There is a point at which the responsibility of a state ceases in respect of concealed acts. What this point is will be a subject for consideration later.

In all this it is evident that the duties of a neutral state are identical with those of a state in a time of universal peace. It is at peace with both the parties to a war; it must therefore fulfil its pacific duties with respect to them. The only difference in the position of a state in the two cases of peace and neutrality is that the range and frequency of the occurrences which call for the fulfilment of duty in time of war is greater than in time of peace. In peace attempts to use the territory of a state to the injury of another state are only made by private persons and are rare, in war they may be made by a belligerent state itself as well as by its subjects, and they may occur at any moment. A state may therefore be reasonably expected to show somewhat more watchfulness as a neutral than can be demanded from it in a season of apparent tranquillity.

§ 22. As territorial sovereignty brings with it duties, so it supplies the measure of neutral responsibility. A state cannot be asked to take cognizance of what occurs outside its own borders. In another country it obviously cannot act. On the sea it is not required to act, both because its jurisdiction, being confined to its own ships, is inadequate, and because it would be beyond the power of any state to supervise the actions of its subjects, or of persons who may have

Territorial  
sovereignty as  
the measure of  
neutral  
responsibility.

PART I. made improper use of its territory, on all the oceans of the  
 CHAP. IV. world. A state therefore washes its hands of responsibility at the edge of its territorial waters. Of whatever hostile conduct its subjects, or other persons issuing from its shores, may be guilty, the remedy of a belligerent is upon them personally, and not upon the nation to which they belong or the territory of which they may have used.

Rights of  
 bellige-  
 rents in  
 restraint  
 of com-  
 mercial  
 acts of in-  
 dividuals.

§ 23. Connected with the cessation of state control at the frontier of state territory, though not springing from it, is a privilege of interference with neutral commerce which belligerents have been allowed to establish. Much of the trade which is ordinarily carried on between states, and which they have a right to carry on with whom they choose in virtue of their general right of self-development, is incompatible with the successful conduct of warlike operations. An army cannot permit free ingress into a besieged town, or egress from it. The stress put upon a country by blockade would be nullified if neutral merchants were allowed to bring in everything that the blockaded state might want. And there are kinds of merchandise, the supply of which to a belligerent, owing to their direct usefulness in war, is peculiarly injurious to his adversary. It is considered that the harm done to a belligerent by noxious trade is so great as to outweigh the loss inflicted upon a neutral by interruption or restriction of his commerce. A belligerent consequently is held to have a right to exact that trade which is injurious to his operations shall be restrained. There are only two ways in which this can be effected. Either the neutral sovereign may be responsible for the conduct of his subjects or the belligerent may himself be entrusted with the necessary power. The grave and obvious inconveniences inseparable from the former method<sup>1</sup> would have

<sup>1</sup> 'No power can exercise such an effective control over the actions of each of its subjects as to prevent them from yielding to the temptations of gain at a distance from its territory. No power can therefore be effectually responsible for the conduct of all its subjects on the high seas; and it has been found more

secured its rejection if the impatience of belligerents had not denied it the opportunity of trial; but the actual practice in fact arose because it was easy for the belligerent to protect himself by summary action, while it was not easy for the neutral sovereign to give him an equal security.

The origin of the privilege was lawless, but existing custom fortunately gives effect to a real distinction which separates non-neutral acts, with which the state is identified, from commercial acts done by individuals from which a belligerent suffers.

An act of the state which is prejudicial to the belligerent is necessarily done with the intent to injure; but the commercial act of the individual only affects the belligerent accidentally. It is not directed against him; it is done in the way of business, with the object of getting a business profit, and however injurious in its consequences, it is not instigated by that wish to do harm to a particular person which is the essence of hostility. It is prevented because it is inconvenient, not because it is a wrong; and to allow the performance by a subject of an act not in itself improper cannot constitute a crime on the part of the state to which he belongs. Trade between a neutral individual and a belligerent, which is prejudicial to the operations of a country at war, not being in itself wrong, even in the qualified sense in which non-neutral national acts can be said to be wrong, the belligerent right to interfere with it is theoretically a derogation from the strict rights of the neutral state, which refrains in so far as its subjects are affected by the belligerent from protecting them in the performance

Distinction  
between  
state acts  
and com-  
mercial  
acts of the  
individual.

convenient to entrust the party injured by such aggressions with the power of checking them. This arrangement seems beneficial to all parties; for it answers the chief end of the law of nations,—checking injustice without the necessity of war. Endless hostilities would result from any other arrangement. If a government were to be made responsible for each act of its subjects, and a negotiation were to ensue each time that a suspected neutral merchantman entered the enemy's port, either there must be a speedy end put to neutrality, or the affairs of the belligerent and neutral must both stand still.' Lord Brougham's Works, ed. 1857, viii. 386.



PART I. of innocent acts. The justification of this usage lies in its  
CHAP. IV. convenience.

The belli-  
gerent is  
allowed to  
control the  
latter  
directly.

By existing custom the belligerent has the right of hindering neutral commerce when it is noxious to him, either because it supplies his enemy with articles of direct use in war, or because it diminishes the stress which he puts upon his enemy; or even because it is tainted by association with hostile property. In all these cases the neutral trader is left face to face with the belligerent nation. It alone determines whether he has infringed its privileges, and in its courts alone can he in the first instance find a remedy for wrongs done to him by its agents. The neutral state cannot interfere until the belligerent has overstepped the boundary of his rights. When he has done this by rendering unjust decisions, the question transfers itself to another head of international law. The belligerent has practically committed an act of war, and the neutral state can demand and exact such reparation as may be needful.

Division of  
the law of  
neutrality  
into two  
branches.

§ 24. It appears, then, that international usage as between belligerents and neutrals consists of two branches, distinct in respect of the parties affected, of the moral relation of these parties to each other, and of the means by which a breach of the accepted rules can be punished.

1. That  
affecting  
states in  
their rela-  
tion to  
one an-  
other.

In one the parties are sovereign states. Both of these are affected by the same duties as in peace time. The belligerent therefore remains under an obligation to respect the sovereignty of the neutral; the neutral is under an equal obligation not to aid directly or indirectly, and within certain limits to prevent a state or private persons from aiding in places under his control, the enemy of the belligerent in matters immediately bearing on the war. If a wrong is done, the remedy is of course international.

2. That  
affecting  
states and  
indivi-  
duals in  
their rela-  
tion to one  
another.

In the other the parties are the belligerent state and the neutral individual. They are, and can be, bound by no obligations to each other. The only duty of the individual is to his own sovereign; and so distinctly is this the case,

that acts done even with intent to injure a foreign state are only wrong in so far as they compromise the nation of which the individual is a member. At the same time the only duty of the belligerent state is to beings of like kind with itself; and it is merely bound to behave in a particular manner to the neutral individual because of the international agreement which sets limits to the severity which may be used in repressing his noxious acts. But within these limits the belligerent is irresponsible. He exacts in his own prize-courts the penalty for infraction of the rules which he is allowed to enforce; and if he inflicts a wrong, it is for him to repair it.

§ 25. This distinction between the usages affecting national and private acts is deeply rooted in the habits of nations. At no time since the rules which make up international law assumed definite shape has there been any room for question as to the existence or nature of an authoritative practice in the matter. But the usage was shaped in the first instance by the blind working of natural forces, and its permanence is more due to their continued operation, than to the clearness with which its principle has been defined by legal writers. It has been, and still is, usual for them to confuse neutral states and individuals in a common relation towards belligerent states; and in losing sight of the sound basis of the established practice they have necessarily failed to indicate any clear boundary of state responsibility. This want of precision is both theoretically unfortunate, and not altogether without practical importance. For it has enabled governments from time to time to put forward pretensions, which though they have never been admitted by neutral states, and have never been carried into effect, cannot be often made without endangering the stability of the principles they attack. But the common sense of statesmen has generally met such pretensions with a decided assertion of the authoritative doctrine, and state papers are not wanting in that clearness which is deficient in the writings of jurists.

PART I.  
CHAP. IV.  
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The two  
branches  
are some-  
times con-  
fused with  
each other.

PART I.  
CHAP. IV.

1777,  
French  
statement  
of the law.

1793,  
American  
statement  
of the law.

1855, do.

In 1777 M. de Vergennes, in his observations on the celebrated English 'Mémoire Justificatif' of that year, said that 'it will be found, whether by consulting usage or treaties, not that trade in articles contraband of war is a breach of neutrality, but that the persons engaged in it are exposed to the confiscation of their goods<sup>1</sup>.' When England suggested to the United States in 1793 that the government of that country 'will deem it more expedient to prevent the execution of the President's Proclamation than to expose vessels belonging to its citizens to those damages which may arise from their carrying articles of the description above-mentioned;' Mr. Jefferson answered, 'Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means perhaps of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace does not require from them such an internal derangement of their occupations<sup>2</sup>.' Again, in 1855, President Pierce, speaking of articles contraband of war, laid down more plainly 'that the laws of the United States do not forbid their citizens to sell to either of the belligerent powers articles contraband of war, or take munitions of war or soldiers on board their private ships for transportation; and although in so doing the individual citizen exposes his property or person to some of the hazards of war, his acts do not involve

<sup>1</sup> De Martens, *Causes Célèbres du Droit des Gens*, iii. 247. The correctness of M. de Vergennes' law is not affected by the circumstance that the facts in the particular case do not seem to have been altogether covered by the principle which he stated. The exportations of articles contraband of war of which the English government complained were chiefly made by a body of persons who owned privateers, sailing under the American flag, but fitted out in French ports, and manned by Frenchmen. In such a case exportations of arms might fairly be taken as part of a series of hostile operations.

<sup>2</sup> Mr. Jefferson to Mr. Hammond, May 15, 1793.

any breach of national neutrality, nor of themselves implicate the government<sup>1</sup>.

PART I.  
CHAP. IV.

In unfortunate contrast with these frank expressions of the clear rule of law was the doctrine maintained by the United States during the civil war and afterwards before the tribunal of arbitration at Geneva. It was then urged that though belligerents may not 'infringe upon the rights which neutrals have to manufacture and deal in military supplies in the ordinary course of commerce,' yet that 'a neutral ought not to permit a belligerent to use the neutral soil as the main if not the only base of its military supplies<sup>2</sup>;' in other words, it was argued that the character of contraband trade alters with the scale upon which it is carried on. In like manner, during the Franco-German war of 1870, Count Bismarck accused the British Government of not acting 'in conformity with the position of strict neutrality taken by it,' in permitting contracts to be entered into by the French Government with English houses for the supply of arms and ammunition<sup>3</sup>. These claims are reflected in the language of M. Bluntschli, who declares that while 'the neutral state cannot be asked to prevent the issue in small quantities of arms and munitions of war, it is altogether different with wholesale export. The latter gives a sensible advantage to one of the two parties, and in the larger number of cases is in fact a subsidy<sup>4</sup>.

The two branches of law confused; recently by the United States and Germany.

Sometimes an inverse confusion occurs to that which is made in the above instance. In 1801 an English frigate seized some Swedish vessels at Oster Risør, within Norwegian waters. Lord Hawkesbury expressed the regret of the English Government that the Danish sovereignty had been violated,

In 1801, by England.

<sup>1</sup> President Pierce's Message, 1st Session 34th Congress.—Among publicists Kent (Comm. lect. vii) and Ortolan (Dip. de la Mer, ii. 177) are distinguished by their clear recognition of the principle involved in the established practice. See also the judgment of Story in the case of the *Santissima Trinidad*, vii Wheaton (American Reports), 340.

<sup>2</sup> Case of the United States, part v.

<sup>3</sup> Lord Augustus Loftus to Earl Granville, July 30, 1870; State Papers, lxx. 73. See also Lord Granville's despatch of August 3, id. 76.

<sup>4</sup> Droit International, § 766.

PART I. but failed to see that the international illegality of the capture  
 CHAP. IV. required the application of an international remedy; and professing that the government had no power to restore the ships, referred the aggrieved parties to the courts<sup>1</sup>.

In 1793, by France. Again, in 1793, on the outbreak of war between Great Britain and France, the latter power endeavoured to use the territory of the United States as a base of operations against English commerce, and fitted out privateers in American ports. While measures were being taken to put a stop to these proceedings, the American Ministry had before it the question in what manner prizes should be dealt with which had been taken before the issue of commissions by the French Minister had been expressly prohibited. Mr. Hamilton thought that the prizes, having been taken in derogation of the sovereignty of the United States, the question of the restoration was a national one; but Mr. Jefferson contended that if the commissions issued by the French Minister were invalid, and the captures were therefore void, the courts would adjudge the property to remain in the former owners; and there being an appropriate remedy at law, it would be irregular for the Government to interfere<sup>2</sup>. It was finally decided to leave the British owner to such remedy as the courts might give him, and the United States only acknowledged an international liability in respect of vessels captured after formal notice to the French Minister that the equipment of cruisers would be looked upon as an infraction of neutrality.

<sup>1</sup> Count Wedel-Jarlsberg, the Danish Minister of Foreign Affairs, declared that his sovereign 'would never consent that the open violation of his territory should be submitted under any pretext whatever to the decision of the courts.' In the end Lord Hawkesbury receded from his pretension, and the ships were given up. Ortolan, *Dip. de la Mer*, Annexe F. ii. 427-33, where the text of the correspondence is to be found.

<sup>2</sup> Marshall's *Life of Washington*, ii. 263-5.

## PART II.

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### CHAPTER I.

#### COMMENCEMENT OF THE EXISTENCE OF A STATE, CHANGES IN THE STATE PERSON, AND EXTINCTION OF A STATE.

§ 26. THEORETICALLY a politically organised community enters of right, as was before remarked, into the family of states and must be treated in accordance with law, so soon as it is able to show that it possesses the marks of a state. The commencement of a state dates nevertheless from its recognition by other powers; that is to say, from the time at which they accredit ministers to it, or conclude treaties with it, or in some other way enter into such relations with it as exist between states alone. For though no state has a right to withhold recognition when it has been earned, states must be allowed to judge for themselves whether a community claiming to be recognised does really possess all the necessary marks, and especially whether it is likely to live. Thus although the right to be treated as a state is independent of recognition, recognition is the necessary evidence that the right has been acquired.

Apart from the rare instances in which a state is artificially formed, as was Liberia, upon territory not previously belonging to a civilised power, or in which a state is brought by increasing civilisation within the realm of law, new states generally come into existence by breaking off from an actually existing state. In the latter case recognition may be accorded

PART II.  
CHAP. I.  
Recognition of a state.

Whether the effects of recognition by a parent state and by third powers are different.

PART II.  
CHAP. I.

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either by the parent country or by a third power, and it is sometimes thought that there is a difference of kind between the recognition which is given by the one and that which proceeds from the other. Sir James Mackintosh, in his speech on the recognition of the Spanish American States, regarded the word recognition, when applied to the acts of the parent state and of other states respectively, as being 'used in two senses so different from each other as to have nothing very important in common,' and Canning held a similar view<sup>1</sup>. With all deference for such high authority, it is not easy to see in what the difference for legal purposes consists. Of course recognition by a parent state, by implying an abandonment of all pretensions over the insurgent community, is more conclusive evidence of independence than recognition by a third power, and it removes all doubt from the minds of other governments as to the propriety of recognition by themselves; but it is not a gift of independence; it is only an acknowledgment that the claim made by the community to have definitively established its independence, and consequently to be in possession of certain rights, is well founded. But recognition by a third power amounts also to this. Practically, no doubt, the difference in the value of the evidence furnished by recognition in the two cases is not unimportant. When a state has itself recognised the independence of a revolted province it cannot pretend that recognition by other states is premature. When it has not done so, it may often be possible for it to bring the conduct of other states into question, and to argue that recognition has not been justified by the facts; and where any colour exists for such an assertion, the state which has recognised an insurgent community is placed in a false position. Until independence is so consummated that it may reasonably be expected to be permanent, insurgents remain legally subject to the state from which they are trying to separate. Premature recognition therefore is a wrong done to the

<sup>1</sup> Mackintosh, *Miscell. Works*, 749 (ed. 1851); *Hansard*, New Ser. xi. 1397.

parent state ; in effect indeed it amounts to an act of inter-  
vention. Hence great caution ought to be exercised by third  
powers in granting recognition ; and, except where reasons of  
policy interfere to prevent strict attention to law, it is seldom  
given unless under circumstances which set its propriety  
beyond the reach of cavil.

PART II.  
CHAP. I.  
—

Most text writers are somewhat loose in their treatment  
of the circumstances under which recognition may be ac-  
corded by third powers. They either, like Klüber, bring in  
the question of the legitimacy of the origin of the new state,  
which must always be open to differences of opinion, or, like  
Wheaton, speak with a vagueness which renders it impossible  
to be sure of their meaning<sup>1</sup>. The true principles of action  
are best illustrated by the conduct of England and the United  
States with respect to the South American Republics, and in  
the debates which took place in Parliament when the question  
of their recognition was considered. In 1810 insurrections  
broke out over the whole of Spanish America. That which  
took place in Buenos Ayres was immediately successful, the  
efforts made by Spain to recover a footing in the country did  
not even lead to its invasion, and it formally declared its  
independence in 1816. Elsewhere a struggle was main-  
tained for several years with various fortune, but already in  
1815 onlookers could forecast its issue<sup>2</sup>, and from 1818  
Chile, which declared its independence in that year, re-  
mained unmolested. Things being in this state, Mr. Clay  
in the latter year laid before Congress a motion in favour  
of recognition. Notwithstanding that several provinces were  
completely freed from the Spaniards, and that they had en-  
joyed undisturbed independence during a considerable time,  
the permanence of the existing order was not thought to be  
sufficiently assured in any part of the continent, so long as  
the mother country had a reasonable chance of success in  
places which, if subdued, would serve as bases of operations

Circum-  
stances  
under  
which re-  
cognition  
may be ac-  
corded by  
third  
powers.

Case of the  
South  
American  
Republics.

<sup>1</sup> Klüber, § 23 ; Wheaton, Elem. pt. i. ch. ii. § 7, 10.

<sup>2</sup> Annual Register for that year, p. 128.



**PART II.** against the remainder, or the recovery of which would liberate  
**CHAP. I.** her forces for use elsewhere. The motion was consequently  
rejected by a large majority. It was not till 1822, when Colombia had expelled the Spaniards, with the exception of the small garrisons of two blockaded forts, while the position of Chile and Buenos Ayres remained the same, that President Monroe felt that he could disregard the continuance of the struggle in Peru, and declared in his message to Congress that the 'contest had reached such a stage, and been attended with such decisive success on the part of the provinces, that it merits the most profound consideration whether their right to the rank of independent states is not complete.' On the matter being referred to the Committee of the Senate on Foreign Affairs, a report in favour of recognition was drawn up in which, it may be noticed, the principle was affirmed that 'the political right of the United States to acknowledge the independence of the Spanish American Republics, without offending others, does not depend upon the justice but on the actual establishment' of that independence. Recognition followed shortly afterwards. By England still greater deliberation was displayed. It was only in 1824, when it could be asked, 'What is Spanish strength?'—and the answer was, 'A single castle in Mexico, an island on the coast of Chile, and a small army in Upper Peru,' that the question of recognition was considered ripe to be seriously taken in hand. Even then Lord Liverpool and Mr. Canning were hardly prepared to entertain it; and the debates of the spring of that year were not followed by the recognition of Buenos Ayres, Colombia, and Mexico till the beginning of 1825. The recognition of Chile was postponed because of the instability of its internal condition. The British Government may perhaps have been unduly slow to be convinced that the South American Republics had in fact definitively achieved their independence; but whether they were right or wrong upon the question of fact, and whatever differences of opinion upon this point may have shown themselves during the debate, the

government and the opposition were thoroughly at one upon the question of principle. The language of Lord Liverpool, as being more concise than that used by other speakers, may be quoted to show the views of Mr. Canning, of Lord Lansdowne, and of Sir J. Mackintosh, as well as of himself. 'He had no difficulty,' he said, 'in declaring what had been his conviction during the years that the struggle had been going on between Spain and the South American provinces—that there was no right while the contest was actually going on . . . The question ought to be—was the contest going on? He, for one, could not reconcile it to his mind to take any such step so long as the struggle in arms, continued undecided. And while he made that declaration he meant that it should be a *bona fide* contest<sup>1</sup>.'

PART II.  
CHAP. I.  
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Assuming that the recognition of the Spanish American Republics by the United States and England may be taken as a typical example of recognition given upon unimpeachable grounds, and bearing in mind the principle that recognition cannot be withheld when it has been earned, it may be said generally that—

Summary of conditions under which independence cannot and can be recognised.

1. Definitive independence cannot be held to be established, and recognition is consequently not legitimate, so long as a substantial struggle is being maintained by the formerly sovereign state for the recovery of its authority; and that

2. A mere pretension on the part of the formerly sovereign state, or a struggle so inadequate as to offer no reasonable

<sup>1</sup> De Martens, *Nouv. Rec.* vi. 148, 154; Hansard, *New Ser.* x. 974 and 999, xi. 1344; *Annual Register*. The principles upon which the British and American governments acted in the case of the South American Republics was reaffirmed by Lord Russell in refusing an application for recognition made by the Confederate States in 1862. Lord Russell to Mr. Mason, Aug. 2, 1862. *State Papers, North America*, No. 2, 1863.

Sir W. Harcourt (*Letters of Historicus*, Nos. i, ii and iii) examines the doctrine of recognition, and analyses the precedents in detail, with reference to the question whether it would have been proper to recognise the Confederate States during their struggle for independence. He shows that several cases, such as those of Belgium and Greece, which are often spoken of as instances of mere recognition, are in fact instances of intervention. For the circumstances under which intervention is permissible, see pt. ii. ch. viii.

PART II. ground for supposing that success may ultimately be obtained,  
 CHAP. I. is not enough to keep alive the rights of the state, and so to  
 prevent foreign countries from falling under an obligation  
 to recognise as a state the community claiming to have be-  
 come one.

Relation  
 of a new  
 state to  
 the con-  
 tract rights  
 and obliga-  
 tions &c. of  
 the parent  
 state.

§ 27. When a new state splits off from one already exist-  
 ing, it necessarily steps into the enjoyment of all rights  
 which are conferred upon it by international law in virtue  
 of its existence as an international person, and it becomes  
 subject to all obligations which are imposed upon it in the  
 same way. No question therefore presents itself with re-  
 spect to the general rights and duties of a new state. What  
 however is its relation to the contract obligations of the  
 state from which it has been separated, to property belonging  
 to and privileges enjoyed by the latter, and to property be-  
 longing in common, before the occurrence of the separation,  
 to subjects of the original state in virtue of their status as  
 such, when some of them after the separation become subjects  
 of the new state ?

Personal  
 rights and  
 obliga-  
 tions, &c.  
 adhere to  
 the parent  
 state.

The fact of the personality of a state is the key to the  
 answer. With rights which have been acquired, and obliga-  
 tions which have been contracted, by the old state as personal  
 rights and obligations the new state has nothing to do. The  
 old state is not extinct; it is still there to fulfil its contract  
 duties, and to enjoy its contract rights. The new state, on  
 the other hand, is an entirely fresh being. It neither is, nor  
 does it represent, the person with whom other states have  
 contracted; they may have no reason for giving it the  
 advantages which have been accorded to the person with  
 whom the contract was made, and it would be unjust to  
 saddle it with liabilities which it would not have accepted on  
 its own account. What is true as between the new state and  
 foreign powers, is true also as between it and the old state.  
 From the moment of independence all trace of the joint life  
 is gone. Apart from special agreement no survival of it is  
 possible, and the two states are merely two beings possessing

no other claims on one another than those which are conferred by the bare provisions of international law. And as the old state continues its life uninterruptedly, it possesses everything belonging to it as a person, which it has not expressly lost; so that property enjoyed by it as a personal whole, or by its subjects in virtue of their being members of that whole, continues to belong to it. On the other hand, rights possessed in respect of the lost territory, including rights under treaties relating to cessions of territory and demarcations of boundary, obligations contracted with reference to it alone, and property which is within it, and which has therefore a local character, or which, though not within it, belongs to state institutions localised there, transfer themselves to the new state person.

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CHAP. I.

Local  
rights and  
obliga-  
tions &c.  
are trans-  
ferred to  
the new  
state.

Thus treaties of alliance, of guarantee, or of commerce are not binding upon a new state formed by separation, and it is not liable for the general debt of the parent state; but it has the advantages of privileges secured by treaty to the inhabitants of its territory or part of it, such as the right of navigating a river running through other countries upwards or downwards from its own frontier; it is saddled with local obligations, such as that to regulate the channel of a river, or to levy no more than certain dues along its course; and local debts, whether they be debts contracted for local objects, or debts secured upon local revenues, are binding upon it. If debts are secured upon special revenues derived from both sections of the old state—if, for example, they are secured upon the customs or excise, they are evidently local to the extent that the hypothecated revenues are supplied by the two sections respectively; they must therefore be proportionately divided. Property which becomes transferred by the fact of separation consists in domains, public buildings, museums and art collections, communal lands, charitable and other endowments connected with the state, and the like. When a portion of the lands belonging to a commune or to an endowment lies without the boundary of the new state it is only considered

PART II. that a right to the value of the property is transferred. Con-  
 CHAP. I. venience may dictate expropriation from the property itself,  
 and it is only then necessary to pay its full value by way of  
 compensation<sup>1</sup>.

<sup>1</sup> Bluntschli, § 47. 55-60.

The subject is one upon which writers on international law are generally unsatisfactory. They are incomplete, and they tend to copy one another. Grotius, for example, says that if a state is split up 'anything which may have been held in common by the parts separating from each other must either be administered in common or be rateably divided.' *De Jure Belli et Pacis*, lib. ii. c. ix. § 10. Kent (Comm. i. 25) does little more than paraphrase this in laying down that 'if a state should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common.' Phillimore quotes Grotius and Kent, and adds, 'if a nation be divided into various distinct societies, the obligations which had accrued to the whole, before the division, are, unless they have been the subject of a special agreement, rateably binding upon the different parts.' i. § cxxxvii. It is difficult to be sure whether these writers only contemplate the rare case of a state so splitting up that the original state person is represented by no one of the fractions into which it is divided, or whether they refer also to the more common case of the loss of such portion of the state territory and population by secession that the continuity of the life of the state is not broken. If the former is their meaning, their doctrine is correct so far as property and monetary obligations are concerned; if not, it would be hard to justify their language even to this extent. No doubt the debt of a state from which another separates itself ought generally to be divided between the two proportionately to their respective resources as a matter of justice to the creditors, because it is seldom that the value of their security is not affected by a diminution of the state indebted to them; but the obligation is a moral, not a legal one. The fact remains that the general debt of a state is a personal obligation. The case also of the creation of a new state out of part of an old one is not distinguishable, so far as the obligation to apportion debts is concerned, from that of the cession of a province by one state to another. When the latter occurs, at least as the result of conquest, it is not usual to take over any part of the general debt of the state ceding territory. The case of Belgium, which took over a portion of the Netherlands debt, is scarcely in point. The treaty of 1839 (*De Martens, Nouv. Rec. xvi. 782*), by which the division of the debt was effected, was part of a general settlement of the countries in question, made at the dictation of Europe with the view of dealing with all the interests concerned in the most equitable and advantageous manner, and not with the bare object of enforcing law. The true rule is recognised by Halleck (i. 76), who distinguishes the case of a state which is so split up as to lose its identity from that of a state which suffers dismemberment without losing its identity. 'Such a change,' he says, 'no more affects its rights and duties, than a change in its internal organisation, or in the person of

Some controversies have occurred which illustrate the PART II.  
 forms in which questions arising out of the application of the CHAP. I.  
 above principles may present themselves. Of these the fol- Case of  
 lowing may be instanced. Upon the separation of the United British  
 States from England the treaty of 1783 secured to the sub- American  
 jects of the former certain fishery privileges upon the coasts fisheries.  
 of Newfoundland, Nova Scotia, and Labrador. After the  
 war of 1812 it was a matter of dispute whether the article  
 dealing with these privileges was merely regulatory, or  
 whether it operated by way of grant, its effect being in the  
 one case merely suspended by war, while in the other the  
 article was altogether abrogated. On the part of the United  
 States it was argued that the treaty of 1783 recognised the  
 right of fishery, of which it is the subject, as a right which,  
 having before the independence of the United States been  
 enjoyed in common by all the inhabitants of the British pos-  
 sessions in North America as attendant on the territory, re-  
 mained attendant after the acquisition of independence upon  
 the portion of that territory which became the United States  
 in common with that which still lay under the dominion of  
 England. Thus the right to a common enjoyment by the  
 two states, after separation, of property which had previously  
 been enjoyed in common by the subjects of the original state  
 was expressly asserted. By England, on the other hand, it was  
 as distinctly maintained 'that the claim of an independent  
 state to occupy and use at its discretion any part of the ter-  
 ritory of another without compensation or corresponding  
 indulgence, cannot rest on any other foundation than con-  
 ventional stipulation<sup>1</sup>.' A like collision of opinion inci- Of the  
 dentally occurred in 1854 during the disputes between Eng- Mosquito  
 land and the United States with reference to the protectorate protecto-  
 rate.

its rulers. This doctrine applies to debts due to, as well as from, the state, and to its rights of property and treaty obligations, except so far as such obligations may have particular reference to the revolted or dismembered territory or province.'

<sup>1</sup> British and Foreign State Papers, vii. 79-97.

PART II. exercised by the former power over the Mosquito shore. It was  
 CHAP. I. at issue whether a protectorate exercised during part of the  
 ——— eighteenth century could be re-established after the separation of Nicaragua from Spain, or whether Nicaragua inherited certain rights stipulated for in treaties with Spain. In illustration of the arguments of the United States reference was made to a treaty between Great Britain and Mexico, and it was urged generally that 'it would be a work of supererogation to attempt to prove, at this period of the world's history, that these provinces having, by a successful revolution, become independent states, succeeded within their respective limits to all the territorial rights of Spain.' Lord Clarendon on his part replied that the clause in the treaty with Mexico stipulating that British subjects shall not be disturbed in the 'enjoyment and exercise of the rights, privileges, and immunities' previously enjoyed within certain limits laid down in a convention with Spain of the year 1786, which had been referred to by Mr. Buchanan as proving the adhesion of Great Britain to the above principle, proves on the contrary that 'Mexico was not considered as inheriting the obligations or rights of Spain,' as otherwise a special stipulation would not be necessary<sup>1</sup>.

Rights of  
the parent  
and the  
new state  
respec-  
tively in  
cases of  
disputed  
boundary.

A war which results in the formation of a new state may be terminated either with or without a treaty of partition and boundary. In the latter case the territory of the newly erected state community is defined by the space which it actually possesses and administers. In the former case the limits indicated by the treaty, if distinctly laid down, become of course the indisputable frontiers. Sometimes however the treaty is indeterminate, either from faults of expression or from imperfect knowledge, on the part of the negotiators, of the country through which the line of demarcation is run; disputes thus arise as to the ownership of portions of territory; and it becomes a question which, or whether either, of the two shall occupy and administer the disputed lands until

<sup>1</sup> De Martens, *Nouv. Rec. Gén.* ii. 210-6.



their respective rights shall have been ascertained or some arrangement shall have been come to. When in such cases one of the parties is in actual possession at the date of the conclusion of the treaty it must be allowed so far to exercise sovereignty within the territory as is requisite for the due government of the latter, the two states being in the same position relatively to one another, to the extent that the meaning of the treaty is doubtful, as if no treaty existed. When neither party on the other hand is in actual possession at the date of the conclusion of the treaty, no rights of sovereignty can be exercised by one of the two except with the consent of the other. A treaty of partition and boundary made between a mother country and a seceding part operates, not as a treaty of cession, but as an acknowledgment that certain territory is in fact in the possession of the state which has succeeded in establishing itself. Were it otherwise, the absurdity would present itself that a new state community would have no title to its territory until a treaty of partition and boundary was made, notwithstanding that the conclusion of a treaty with it involves a previous acknowledgment that it is a state, and consequently that it is already in legal possession of its territory. Hence disputed territory is not attributed to the mother country up to the moment at which it is shown to have been conveyed to the seceded state; the two states have equal rights as thoroughly as if they were of independent origin.

Much of the above doctrine came under discussion during the Maine boundary dispute between England and the United States. At the peace of 1783 the limits of Maine were inadequately fixed, and a considerable tract of country was claimed under the terms of the treaty by both the signatory powers. Part of this may have been settled before 1783, part remained unoccupied in 1827 when the discussion in question arose, and part was settled at different times from 1790 onwards. It was admitted by the American government that Great Britain had a right to a 'de facto juris-

The Maine  
boundary.



PART II. diction' over territory, if any such existed, which was in-  
 CHAP. I. habited before 1783; and the English government refrained, though evidently as a matter of concession and not of duty, from exercising proprietary or sovereign rights within the unoccupied territory; the discussion consequently turned only on the proper mode of dealing with the portion settled later than 1790. It was argued by Lord Aberdeen that before the independence of the United States the country in dispute was under British sovereignty as well as the adjoining province, to which by the contention of England it was attached; and that as the claim of the United States rested on a cession followed by no actual delivery, the national character of the territory could not have undergone any change since a period antecedent to the treaty of 1783. 'It is consistent,' he added, 'with an acknowledged rule of law that when a doubt' as to the right of sovereignty 'exists, the party who has once clearly had a right and who has retained actual possession shall continue to hold it until the question at issue may be decided.' On behalf of the United States it was denied that the title to such territory as might be found to have been indicated by the treaty of 1783 was given by that treaty; the treaty confirmed but did not create; the title of the United States was pre-existent and, it was alleged, was based upon anterior rights possessed 'by that portion of His Majesty's subjects which had established itself' in the country comprised within the territory of the United States<sup>1</sup>. The latter part of the American position was untenable; but it was unnecessary; and the United States were certainly justified in their general contention that territory which was only constructively in possession of England before the treaty of 1783 could not be brought under its actual sovereignty so long as the validity of its title was in litigation.

Effects of  
cession  
upon the

§ 28. When part of a state is separated from it by way of cession, the state itself is in the same position with respect

<sup>1</sup> British and Foreign State Papers, 1827-8, 490-585.

to rights, obligations, and property as in the case of acquisition of independence by the separated portion<sup>1</sup>. PART II.  
CHAP. I.

To a certain extent also the situation of the separated part is identical with that which it would possess in the case of independence. It carries over to the state which it enters the local obligations by which it would under such circumstances have been bound, and the local rights and property which it would have enjoyed. In other respects it is differently placed. In becoming incorporated with the state to which it is ceded it acquires a share in all the rights which the former has as a state person, and it is bound by the parallel obligations. Thus, for instance, the provisions of treaties between a state and foreign powers, including among the latter the state which has ceded territory acquired by the former, are extended to provinces obtained by cession. rights &c.  
of the state  
ceding,  
and the  
state ac-  
quiring,  
territory.

§ 29. When a state ceases to exist by absorption in another state, the latter in the same way is the inheritor of all local rights, obligations, and property; and in the same way also the provisions of treaties which it has concluded are extended to affect the annexed territory. Thus after the incorporation of Naples in the kingdom of Italy it was decided by the Courts both of Italy and France that a treaty of 1760 between France and Sardinia relative to the execution of judgments of the tribunals of the one power within the territory of the other was applicable to the whole Italian state. There is this difference however between the effect of acquisition by cession and by absorption of an entire state, that in the latter case, the annexing power being heir to the whole property of the incorporated state, it is liable for Effects of  
absorption  
of a state.

<sup>1</sup> There are one or two instances in which a conquering state has taken over a part of the general debt of the state from which it has seized territory. Thus in 1866 the debt of Denmark was divided between that country and Slesvig-Holstein (De Martens, *Nouv. Rec. Gén.* xvii. ii. 477); and in the same year Italy, by convention with France, took upon itself so much of the Papal debt as was proportionate to the revenues of the Papal provinces which it had appropriated. Lawrence, *Commentaires sur les Éléments, &c. de Wheaton*, i. 214. It may be doubted whether any other like cases have occurred.

PART II. the whole debts of the latter, and not merely for those con-  
 CHAP. I. — tracted for local objects or secured upon special revenues ;  
 unless indeed it is considered that local debt and general debt  
 are only different words for the same thing when a state loses  
 its separate existence and is taken bodily in to form a member  
 of another state.

## CHAPTER II.

### TERRITORIAL PROPERTY OF A STATE.

§ 30. THE territorial property of a state consists in the territory occupied by the state community and subjected to its sovereignty, and it comprises the whole area, whether of land or water, included within definite boundaries ascertained by occupation, prescription, or treaty, together with such inhabited or uninhabited lands as are considered to have become attendant on the ascertained territory through occupation or accretion, and, when such area abuts upon the sea, together with a certain margin of water.

PART II.  
CHAP. II.

In what  
the territorial  
property of  
a state  
consists.

§ 31. A state may acquire territory through a unilateral act of its own by occupation, by cession consequent upon contract with another state or with a community or single owner, by gift, by prescription through the operation of time, or by accretion through the operation of nature.

Modes of  
acquiring  
it.

§ 32. When a state does some act with reference to territory unappropriated by a civilised or semi-civilised state, which amounts to an actual taking of possession, and at the same time indicates an intention to keep the territory seized, it is held that a right is gained as against other states, which are bound to recognise the intention to acquire property, accompanied by the fact of possession, as a sufficient ground of proprietary right. The title which is thus obtained, and which is called title by occupation, being based solely upon the fact of appropriation, would in strictness come into existence with the commencement of effective

Occupation.

PART II. control, and would last only while it continued, unless the  
 CHAP. II. territory occupied had been so long held that title by occupation had become merged in title by prescription. Hence occupation in its perfect form would suppose an act equivalent to a declaration that a particular territory had been seized as property, and a subsequent continuous use of it either by residence or by taking from it its natural products.

States have not however been content to assert a right of property over territory actually occupied at a given moment, and consequently to extend their dominion *pari passu* with the settlement of unappropriated lands. The earth-hunger of colonising nations has not been so readily satisfied; and it would besides be often inconvenient and sometimes fatal to the growth or perilous to the safety of a colony to confine the property of an occupying state within these narrow limits. Hence it has been common, with a view to future effective appropriation, to endeavour to obtain an exclusive right to territory by acts which indicate intention and show momentary possession, but which do not amount to continued enjoyment or control; and it has become the practice in making settlements upon continents or large islands to regard vast tracts of country in which no act of ownership has been done as attendant upon the appropriated land<sup>1</sup>.

Effect of  
discovery  
and appropriation  
without  
settlement.

In the early days of European exploration it was held, or at least every state maintained with respect to territories discovered by itself, that the discovery of previously unknown land conferred an absolute title to it upon the state by whose agents the discovery was made. But it has now been long settled that the bare fact of discovery is an insufficient ground of proprietary right. It is only so far useful that it gives additional value to acts in themselves doubtful or inadequate. Thus when an unoccupied country is formally

<sup>1</sup> Some writers (e.g. Klüber, § 126; Ortolan, *Domaine International*, 45-7; Bluntschli, § 278, 281) refuse to acknowledge that title can be acquired without continuous occupation, but their doctrine is independent of the facts of universal practice.

annexed an inchoate title is acquired, whether it has or has not been discovered by the state annexing it; but when the formal act of taking possession is not shortly succeeded by further acts of ownership, the claim of a discoverer to exclude other states is looked upon with more respect than that of a mere appropriator, and when discovery has been made by persons competent to act as agents of a state for the purpose of annexation, it will be presumed that they have used their powers, so that in an indirect manner discovery may be alone enough to set up an inchoate title.

An inchoate title acts as a temporary bar to occupation by another state, but it must either be converted into a definitive title within reasonable time by planting settlements or military posts, or it must at least be kept alive by repeated local acts showing an intention of continual claim. What acts are sufficient for the latter purpose, and what constitutes a reasonable time, it would be idle to attempt to determine. The effect of acts and of the lapse of time must be judged by the light of the circumstances of each case as a whole. It can only be said, in a broad way, that when territory has been duly annexed, and the fact has either been published or has been recorded by monuments or inscriptions on the spot, a good title is acquired as against a state making settlements within such time as, allowing for accidental circumstances or moderate negligence, might elapse before a force or a colony were sent out to some part of the land intended to be occupied; but that in the course of a few years the presumption of permanent intention afforded by such acts dies away, if they stand alone, and that more continuous acts or actual settlement by another power become a stronger root of title. On the other hand, when discovery, coupled with the public assertion of ownership, is followed up from time to time by further exploration or by temporary lodgments in the country, the existence of a continued interest in it is evident, and the extinction of a proprietary claim may be prevented over a long space of time, unless more

PART II.  
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How an  
inchoate  
title so  
acquired  
may be  
kept alive.

PART II. definite acts of appropriation by another state are effected  
 CHAP. II. without protest or opposition.

Occupation  
 must be a  
 state act.

In order that occupation shall be legally effected it is necessary, either that the person or persons appropriating territory shall be furnished with a general or specific authority to take possession of unappropriated lands on behalf of the state, or else that the occupation shall subsequently be ratified by the state. In the latter case it would seem that something more than the mere act of taking possession must be done in the first instance by the unauthorised occupants. If, for example, colonists establishing themselves in an unappropriated country declare it to belong to the state of which they are members, a simple adoption of their act by the state is enough to complete its title, because by such adoption the fact of possession and the assertion of intention to possess, upon which the right of property by occupation is grounded, are brought fully together. But if an uncommissioned navigator takes possession of lands in the name of his sovereign, and then sails away without forming a settlement, the fact of possession has ceased, and a confirmation of his act only amounts to a bare assertion of intention to possess, which being neither declared upon the spot nor supported by local acts is of no legal value. A declaration by a commissioned officer that he takes possession of territory for his state is a state act which shows at least a momentary conjunction of fact and intention; where land is occupied by unauthorised colonists, ratification, as has been seen, is able permanently to unite the two; but the act of the uncommissioned navigator is not a state act at the moment of performance, and not being permanent in its local effects it cannot be made one afterwards, so that the two conditions of the existence of property by occupation, the presence of both of which is necessary in some degree, can never co-exist<sup>1</sup>.

<sup>1</sup> On the conditions of effective occupation, see Vattel, liv. i. ch. xviii. § 207, 208; De Martens, Précis, § 37; Phillimore, i. § cxxvi-viii; Twiss, i. § 111,

There is no difference of opinion as to the general rule under which the area affected by an act of occupation should be determined. A settlement is entitled, not only to the lands actually inhabited or brought under its immediate control, but to all those which may be needed for its security, and to the territory which may fairly be considered to be attendant upon them. When an island of moderate size is in question it is not difficult to see that this rule involves the attribution of property over the whole to a state taking possession of any one part. But its application to continents or large islands is less readily made. Settlements are usually first established upon the coast, and behind them stretch long spaces of unoccupied country, from access to which other nations may be cut off by the appropriation of the shore lands, and which, with reference to a population creeping inwards from the sea must be looked upon as more or less attendant upon the coast. What then in this case is involved in the occupation of a given portion of shore? It may be regarded as a settled usage that the interior limit shall not extend further than the crest of the watershed<sup>1</sup>; but the

PART II.  
CHAP. II.

Area af-  
fected by  
an act of  
occupation.

114, 120; Twiss, *The Oregon Question*, 165 and 334; Bluntschli, § 278-9; and especially the documents containing the arguments used internationally in the controversies mentioned below.

<sup>1</sup> A right of indefinite interior extension is sometimes said to have been asserted by the different nations who colonised North America. According to Mr. Calhoun they 'claimed for their settlements usually specific limits along the coast, and generally a region of corresponding width extending across the entire continent to the Pacific Ocean,' and England is alleged to have maintained the pretension against France before the Peace of 1763. Mr. Calhoun's allegation was however made, as was a like statement by Mr. Gallatin, in order to fortify the claim of the United States to the country west of the Rocky Mountains; the original papers connected with the negotiations of 1761-2, in so far as they are printed in Jenkinson's *Treaties* (vol. iii), give no indication that any such claim as that mentioned was made by England; and Sir Travers Twiss (*The Oregon Question*, 249) says that 'it does not appear that any conflicting principles of international law were advanced by the two parties.' I am not aware that any other dispute had occurred in the course of which the principle could have been affirmed. Probably therefore the statement has no better ground than the fact that English colonial grants were made without interior limits,—a fact which by itself is of no international value.



PART II.  
CHAP. II.  
—

lateral frontiers are less certain. It is generally admitted that occupation of the coast carries with it a right to the whole territory drained by the rivers which empty their waters within its line; but the admission of this right is perhaps accompanied by the tacit reservation that the extent of coast must bear some reasonable proportion to the territory which is claimed in virtue of its possession. It has been maintained, but it can hardly be conceded, that the whole of a large river basin is so attendant upon the land in the immediate neighbourhood of its outlet that property in it is acquired by merely holding a fort or settlement at the mouth of the river without also holding lands to any distance on either side. Again, it is not considered that occupation of one bank of a river necessarily confers a right to the opposite bank, still less to extensive territory beyond it, so that if a state appropriates up to a river and stops there, its presence will not debar other states from occupying that portion of the basin which lies on the further side; nor even, though there is a presumption against them, will they be debarred as of course from occupying the opposite shore. When two states have settlements on the same coast, and the extent along it of their respective territories is uncertain, it seems to be agreed that the proper line of demarcation is midway between the last posts on either side, irrespectively of the natural features of the country<sup>1</sup>.

Illustrations of the foregoing doctrines.  
Texas.

§ 33. The manner in which the foregoing doctrines are used in international controversies may be illustrated by the following examples.

After the cession of Louisiana to the United States by France in 1803 a dispute arose between the former power and Spain as to the boundaries of the ceded territory, which according to the United States extended in a westerly direction to the Rio Grande, and in the opinion of Spain reached only to a line drawn between the Red River and the Sabine.

<sup>1</sup> Phillimore, i. § ccxxxii-viii; Twiss, i. § 115-9, 124; and The Oregon Question, 249.

The facts of the case were as follows. Between the years 1518 and 1561 the northern shores of the Gulf of Mexico were gradually explored by Spanish officers, but no settlements were made upon them, and they were very imperfectly known, when in 1681-2 a French officer named La Salle succeeded in descending the Ohio and the Mississippi to the ocean, and took formal possession of the country at the mouth of the latter river in the name of his sovereign. On his return it was determined to make a permanent settlement, and in 1685 he was sent out in command of an expedition for the purpose. Being unable to find the entrance to the Mississippi he coasted along to the Bay of Espiritu Santo<sup>1</sup>, about four hundred miles further to the west, where a fort was erected, and held until the garrison was massacred by the Indians in 1689. In the course of the next year the Spaniards appeared in the Bay and founded a settlement, which remained from that time in continuous existence. Gradually scattered posts were pushed eastwards and northwards into Texas. The French on their part did nothing further until 1712, when Louis XIV, relying on the acts of discovery and appropriation which had been done by La Salle, granted to Anthony Crozat, by letters patent, the exclusive commerce of the territory which was claimed by the French Crown in virtue of those acts, declaring it to comprehend "all the lands, coasts, and islands which are situated in the Gulf of Mexico, between Carolina on the east and Old and New Mexico on the west, with all the streams which empty into the ocean within those limits, and the interior country dependent on the same." A settlement was then made near the site of New Orleans, and outlying posts were established, none of which however seem to have been placed in a westerly direction at a more advanced point than Natchitoches on the Red River. To watch the post which existed there a Spanish fort was established in 1714 at a distance of only seven leagues, and it was kept garrisoned until

<sup>1</sup> Called the Bay of St. Bernard by La Salle.

PART II. Louisiana came into the hands of Spain<sup>1</sup>, when, being no  
CHAP. II. longer required, it was abandoned. No colonisation appears  
to have taken place to the east of the Rio Colorado, but a  
line of settlements, of which some were of considerable size,  
was formed between the Bay of Espiritu Santo and the  
Province of Sonora. The United States, as assignees of the  
French title, claimed to possess the basin of the Mississippi  
by right of discovery and of settlement at its mouth, and  
the province of Texas in virtue of occupation of the coast,  
which, it was asserted, had been definitively appropriated by  
the acts of La Salle at the mouth of the Mississippi and  
at the Bay of Espiritu Santo, and to which a title had been  
kept alive by the subsequent establishment of the French  
posts upon the river. It was further argued that as the  
French title became definitive in 1685 the boundary should  
run along the Rio Grande, that river being half-way between  
Espiritu Santo and the then nearest Spanish settlement, which,  
it was argued, lay in the Province of Panuco. All acts, it  
was alleged, which had been done by the Spaniards east of the  
Rio Grande were acts of usurpation, and consequently in-  
capable of giving title. The claim of the United States to  
the basin of the Mississippi was not seriously contested,  
but with respect to Texas it was urged that the discoveries  
of Spanish navigators had put Spain in possession of its  
coasts before the French landed in the Bay of Espiritu Santo,  
that the lodgment effected there by the latter was merely  
temporary, and that the long-continued and uninterrupted  
subsequent possession of the whole country by Spain was  
a better root of title than a prior unsuccessful attempt to  
establish herself on the part of France. It was therefore  
demanded that the frontier between the two states should  
be fixed half-way between the posts which had been per-  
manently occupied by the French and the Spaniards re-  
spectively. Ultimately the boundary was settled very nearly  
along the line suggested by Spain, as part of a general scheme

<sup>1</sup> Louisiana was ceded to Spain in 1762, and re-ceded to France in 1800.

of boundary settlement, under which that country made sacrifices elsewhere <sup>1</sup>. PART II.  
CHAP. II.

Another controversy of considerable interest is that which arose between England and the United States with reference to the Oregon Territory. In this case the negotiations passed through two distinct phases, during the earlier of which the United States claimed the river basin of the Columbia, while during the latter they claimed in addition the whole country northwards to the parallel of  $54^{\circ} 40'$ . The original claim rested upon discovery and settlement. In 1792 an American trader named Gray discovered the mouth of the river Columbia, and sailed up twelve or fifteen miles, until the channel by which he entered ceased to be navigable. Some years before, Heçeta, a Spanish navigator, in passing across the entrance had observed a strong outflow, and had come to the conclusion that a river debouched at the spot. A few weeks before Gray entered it, Captain Vancouver, who was engaged in surveying the coast for the English government, had noticed the existence of a river, but thought it too small for his vessels to go into. On hearing of Gray's success in entering he returned, and an officer under his command, after finding the true channel, explored the river for a hundred miles, and formally took possession of the country in the King's name. Gray was uncommissioned; he made no attempt to take possession of the country on behalf of the United States, and his discovery, which was only known to his government through Captain Vancouver's account, was not followed up by any act which could give it a national value. In 1811 a trading company of New York established near the mouth of the river a commercial post, which in 1813 was sold to the English North-West Company<sup>2</sup>. Upon these facts it was argued by the American negotiators

<sup>1</sup> British and Foreign State Papers, 1817-18.

<sup>2</sup> Some explorations made by both English and Americans of the various head waters of the Columbia may be allowed to balance one another. They were of little importance from a legal point of view.

PART II. that Gray effected a discovery, the completeness of which was  
CHAP. II.  
not diminished by anything which occurred before or after; that his predecessors had failed to ascertain the existence of a great river, and that the subsequent English exploration was simply a mechanical extension of what had been essentially done by him; that his discovery vested the basin of the Columbia in the United States; and that, the land having thus become national property, the establishment of a trading post formed a substantive act of possession on their part. The English negotiators on the other hand, besides putting forward a claim by discovery to the whole coast as against the United States, maintained that the discovery of the river was a progressive one, and objected that, even were it not so, the acts of an uncommissioned discoverer are incapable of giving title and that the discovery was not supported by national acts. Under such circumstances the establishment of a trading post ceased to be of importance. The negotiations entered upon their second phase after the conclusion of a boundary treaty between the United States and Spain in 1819, by which the former power acquired by cession whatever rights were possessed by the latter to country north of the forty-second parallel. From the point of view of the law of occupation this is of minor interest, because the force of the respective claims depended upon the relative value of two sets of acts of discovery purporting to be of identical character. The question at issue was rather one of fact than of law. It was alleged by the United States that Spain, until it ceded its rights, had possessed a title to the whole coast through discoveries gradually perfected during two centuries<sup>1</sup>, and by occupation at various points: while on the part of England it was contended that the real discovery of the coast had been effected by Sir Francis Drake

<sup>1</sup> There is great reason to doubt whether some of the Spanish navigators who are alleged to have made discoveries along the north-west coast of America ever existed, and it is certain that the accounts supplied by others are untruthful. See Twiss's *Oregon Question*, chap. iv.

in 1579, by Captain Cook in 1778, and during the systematic survey of Vancouver in 1792-4, and that the two latter officers had taken actual possession. It need only be remarked that the later contention of the United States was inconsistent with its original claim. To affirm the Spanish title was to proclaim the nullity of the title said to have been conferred by the discoveries of Gray. If the title through Gray was good, the coast up to the fifty-fourth parallel did not belong to Spain; if it did belong to Spain, Gray's discovery was evidently worthless<sup>1</sup>.

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§ 34. When an occupied territory is definitively abandoned, either voluntarily or in consequence of expulsion by savages or by a power which does not attempt to set up a title for itself by conquest, the right to its possession is lost, and it remains open to occupation by other states than that which originally occupied it. But when occupation has not only been duly effected, but has been maintained for some time, abandonment is not immediately supposed to be definitive. If it has been voluntary, the title of the occupant may be kept alive by acts, such as the assertion of claim by inscriptions, which would be insufficient to confirm the mere act of taking possession; and even where the abandonment is complete an intention to return must be presumed during a reasonable time. If it has been involuntary, the question whether the absence of the possessors shall or shall not extinguish their title depends upon whether the circumstances attendant upon and following

Abandonment of territory acquired by occupation.

<sup>1</sup> Parl. Papers, lii. 1846, Oregon Correspondence. In the latter part of the discussion the English government relied also upon the Convention of the Escorial, usually called the Nootka Sound Convention, by which it maintained that Spain had made an acknowledgment of the existence of a joint right of occupancy on the part of England in those portions of North-west America which were not already occupied. The United States contested the accuracy of the construction placed upon the Convention by England. As the dispute so far as it turned upon this point has no bearing upon the law of occupation, it is unnecessary to go into it. For the facts of the case and the English and American views, see De Garden, *Histoire des Traités de Paix*, v. 95; Parl. Papers, lii. 1846, Oregon Corresp. 34 and 39; Twiss, *Oregon Question*, 379. For the Convention, see De Martens, *Rec.* iv. 493.

PART II. the withdrawal suggest the intention, or give grounds for  
 CHAP. II. reasonable hope, of return. Where intention in this case is  
 — relied upon it is evident that, as abandonment was caused by  
 the superior strength of others who might interfere with  
 return, a stronger proof of effective intention must be afforded  
 than on an occasion of voluntary abandonment, and that the  
 effect of a mere claim, based upon the former possession, if  
 valid at all, will soon cease.

Case of  
 Santa  
 Lucia ;

In 1639 Santa Lucia was occupied by an English colony, which was massacred by the Caribs in the course of 1640. No attempt was made to recolonise the island during the following ten years. In 1650 consequently the French took possession of it as unappropriated territory. In 1664 they were attacked by Lord Willoughby and driven into the mountains, where they remained until he retired three years later, when they came down and reoccupied their lands. Whether they died out does not appear, though probably this was the case, for at the Treaty of Utrecht Santa Lucia was viewed as a 'neutral island' in the possession of the Caribs. The French however seem to have considered their honour as being involved in the ultimate establishment of their claim. During the negotiations which led to the peace of 1763 they attached importance to the acquisition of the island, and by the terms of that peace it was ultimately assigned to them. There can be little doubt, considering the shortness of the time during which the English colony had existed, and the length of the period during which no attempt was made to re-establish it, that the French were justified in supposing England to have acquiesced in the results of the massacre, and that their occupation consequently was good in law<sup>1</sup>.

of Delagoa  
 Bay.

The most recent controversy to which title by occupation has given rise turned mainly upon the effect of a temporary cessation of the authority of the occupying state. From 1823 to 1875, when the matter was settled by arbitration, a dispute

<sup>1</sup> Jenkinson's Treaties, iii. 118, 157, 170.

existed between England and Portugal as to some territory at Delagoa Bay, which was claimed by the former under a cession by native chiefs in the first-mentioned year, and by the latter on the grounds, amongst others, of continuous occupation. It was admitted that Portuguese territory reached to the northern bank of the Rio de Espiritu Santo or English River, which flows into the bay, and that a port and village had long been established there. The question was whether the sovereignty of Portugal extended south of the river, or whether the lands on that side had remained in the possession of their original owners. England relied upon the facts that the natives professed to be independent in 1823, that they acted as such, and that the commandant of the fort repudiated the possession of authority over them. In the memorials which were submitted on behalf of Portugal, amidst much which had no special reference to the territory in dispute, there was enough to show that posts had been maintained within it from time to time, and that authority had probably been exercised intermittently over the natives. The area of the territory being small, and all of it being within easy reach of a force in possession of the Portuguese settlement, there could be little difficulty in keeping up sufficient control to prevent a title by occupation from dying out. There was therefore a presumption in favour of the Portuguese claim. The French government, which acted as arbitrator, took the view that the interruption of occupation, which undoubtedly took place in 1823, was not sufficient to oust a title supported by occasional acts of sovereignty done through nearly three centuries, and adjudged the territory in question to Portugal<sup>1</sup>.

It is not unlikely that the title of Portugal to a considerable portion of the coast of Africa might be found on investigation to resemble closely that which it had to Delagoa Bay apart from English intrusion. If so, the decision of the French government will probably have an important effect

<sup>1</sup> Parl. Papers, xlii. 1875.



PART II. in determining the conditions under which any European  
 CHAP. II. colonisation of the interior of the continent can take place.

Cession.

§ 35. Cessions of territory, whether by way of sale or exchange, and gifts, whether made by testament or during the lifetime of the donor, call for no special remark, the alienation effected by their means being within the general scope of the powers of alienation which have been already mentioned as belonging to a state<sup>1</sup>, and the questions of competence on the part of the individuals contracting or giving which may arise being matters which, in so far as they belong to international law and not to the public law of the particular state, will find their proper place in a later chapter<sup>2</sup>.

Prescription.

§ 36. Title by prescription arises out of a long-continued possession, where no original source of proprietary right can be shown to exist, or where possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his right, or has been unable to do so. The principle upon which it rests is essentially the same as that of the doctrine of prescription which finds a place in every municipal law, although in its application to beings for whose disputes no tribunals are open, some modifications are necessarily introduced. Instead of being directed to guard the interests of persons believing themselves to be lawful owners, though unable to prove their title, or of persons purchasing in good faith from others not in fact in legal possession, the object of prescription as between states is mainly to assist in creating a stability of international order which is of more practical advantage than the bare possibility of an ultimate victory of right. In both cases the admission of a proprietary right grounded upon the mere efflux of time is intended to give security to property and to diminish litigation, but while under the conditions of civil life it is possible so to regulate

<sup>1</sup> § 9.

<sup>2</sup> Instances of alienation by sale, exchange, gift, and will, may be found in Phillimore, i. § cclxviii-lxx, and cclxxv; and in Calvo, § 186-7.

its operation as to render it the handmaid of justice, it must be frankly recognised that internationally it is allowed, for the sake of interests which have hitherto been looked upon as supreme, to lend itself as a sanction for wrong, when wrong has shown itself strong enough not only to triumph for a moment, but to establish itself permanently and solidly. Internationally therefore prescription must be understood not only to confer rights when, as is the case with several European countries, the original title of the community to the lands which form the territory of the state or its nucleus is too mixed or doubtful to be appealed to with certainty; or, as has sometimes occurred, when settlements have been made and enjoyed without interference within lands claimed, and perhaps originally claimed with right, by states other than that forming the settlement; but also to give title where an immoral act of appropriation, such as that of the partition of Poland, has been effected, so soon as it has become evident by lapse of time that the appropriation promises to be permanent, in the qualified sense which the word permanent can bear in international matters, and that other states acquiesce in the prospect of such permanence. It is not of course meant that a title so acquired is good as against any rights which the inhabitants of the appropriated country may have to free themselves from a foreign yoke, but merely that it is good internationally, and that neither the state originally wronged nor other states deriving title from it have a right to attack the intruding state on the ground of deficient title, when once possession has been consolidated by time, whether the title was bad in its inception, or whether, having been founded on an obsolete or extinguished treaty, it has become open, in the absence of prescription, to question on the ground of the rights of nationality or of former possession<sup>1</sup>.

<sup>1</sup> A denial of title by prescription has as yet been rarely formulated in international law, but there can be little doubt that the sense of its value has diminished of late years, mainly under the influence of the sentiment of

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CHAP. II.

Accretion  
by the  
operation  
of nature.

§ 37. By the action of water new formations of land may come into existence in the neighbourhood of the territory occupied by a state, either in the open sea, or in waters lying between the territory of the state and that of a neighbour, or in actual contact with land already appropriated, or changes may take place in the course of rivers, by which channels are dried up, and appropriated land is covered with

nationality. In the acquiescence with which the annexation of Alsace and Lorraine to Germany in 1871 was in some cases received, and the mildness of the disapproval with which it was elsewhere met, it is impossible not to recognise the want of a due appreciation of the importance of prescription as a check upon unnecessary territorial disturbance. If the severance from France of Alsace and Lorraine had been looked upon as an instance of naked conquest, it is probable that European public opinion would have been gravely shocked by the measure. It is eminently doubtful whether respect for title by prescription, altogether apart from its tranquillising tendency, does not lead to better results than are likely to be offered by the views which are dominant at present in the popular mind throughout Europe. The principle of nationality is at any rate associated with a good deal of crude thought, and includes more than one distinctly retrogressive idea. That there have been certain cases in which it was just and for the common good to give free scope to it is not even a sufficient justification for the prominence which it has been allowed to assume in politics; and it is nothing short of extraordinary that a doctrine which can so little bear strict examination should be permitted to intrude into the domain of legal ideas so often as is the case.

The tendency to import the political notion of nationality into law has been especially marked in Italy; and if the brilliant essay of Mamiani (*D'un nuovo diritto Europeo*) may be accounted for and excused by the epoch of its publication (1860), it is unfortunate that the work of Fiore (*Nouveau Droit International*) should continue after the unification of the country to perpetuate a doctrine as law, which ought to have been seen, when the eager feelings of the period of liberation had subsided, to have nothing to do with it.

Lampredi (*Jur. Pub. Univ. Theorem.* p. iii. cap. viii), De Martens (*Précis*, § 70-1), and Klüber (§ 6), deny the existence of prescription as between states, on the ground that prescription is not a principle of natural law, and that there being no fixed term for the creation of international title by it, it cannot be said to have been adopted into international positive law. Mamiani (p. 24) denies the existence of international prescription, because it cannot exist 'in faccia ai diritti essenziali ed irremovibili della persona umana,' but, as the words quoted may suggest, he is thinking only of the relations of a dominant state to a subject population.

For the views ordinarily held upon the subject, see e.g. Grotius (*De Jure Belli et Pacis*, lib. ii. c. iv); Wolff (*Jus Gent.* § 358-9); Vattel (liv. ii. ch. xi. § 147, 50); Wheaton (*Elem.* pt. ii. ch. iv. § 4); Riquelme (i. 28); Phillimore (i. § cclv-viii); Bluntschli (§ 290); Calvo (§ 173).

water. Out of such cases questions of proprietorship spring, to deal with which the provisions of Roman law, in this matter the simple embodiment of common sense, have been adopted into international law. When the frontier of a state is formed by a natural water boundary, and not by a line indicated by fixed marks which happen to coincide with the waters' edge, accretions received by the land from gradual fluvial deposit become the property of the state to the territory of which they attach themselves, even though if, when the deposits take place in the bed of a river, its course may in the lapse of time be so diverted that the land receiving accretion occupies part of the original emplacement of the neighbouring territory. If however the boundary is a fixed line, the results of accretion naturally fall to the owner of whatever lies on the further side of the line. When the bed of the river belongs equally to two states, islands formed wholly on one side of the centre of the deepest channel belong to the state owning the nearer shore; while those that form in mid-stream are divided by a line following the original centre of the channel. Analogously, islands formed in the sea out of the alluvium brought down by a river become, as they grow into existence, appendages of the state to which the coast belongs, so that though they may be beyond the distance from shore within which the sea is territorial, they cannot be occupied by foreign states, and even while still composed of mud and of insufficient consistency for any useful purpose, they are so fully part of the state territory that the waters around them become territorial to the same radius as if they were solid ground. On occasions of sudden change, as when a river breaks into a new course entirely within the territory of one of the riparian states, or when a lake, of which the bed belongs wholly to one state, overflows into low-lying lands belonging to another state and transforms them into a lagoon, no alteration of property takes place; and the boundary between the states is considered to lie in the one case along the old

PART II. bed of the river, and in the other along the former edge  
 CHAP. II. of the lake<sup>1</sup>.

Boundaries  
 of state  
 territory.

§ 38. The boundaries of state territory may consist either in arbitrary lines drawn from one definite natural or artificial point to another, or they may be defined by such natural features of a country as rivers or ranges of hills. In the latter case more than one principle of demarcation is possible; certain general rules therefore have been accepted which provide for instances in which from the absence of express agreement or for other reasons there is doubt or ignorance as to the frontier which may justly be claimed. Where a boundary follows mountains or hills, the water-divide constitutes the frontier. Where it follows a river, and it is not proved that either of the riparian states possesses a good title to the whole bed, their territories are separated by a line running down the middle, except where the stream is navigable, in which case the centre of the deepest channel, or, as it is usually called, the *Thalweg*, is taken as the boundary. In lakes, there being no necessary track of navigation, the line of demarcation is drawn in the middle. When a state occupies the lands upon one side of a river or lake before those on the opposite bank have been appropriated by another power, it can establish property by occupation in the whole of the bordering waters, as its right to occupy is not limited by the rights of any other state; and as it must be supposed to wish to have all the advantages to be derived from sole possession, it is a presumption of law that occupation has taken place. If, on the other hand, opposite shores have been occupied at the same time, or if priority of occupation can be proved by neither of the riparian states, there is a presumption in favour of equal rights, and a state claiming to hold the entirety of a stream or lake

<sup>1</sup> Grotius, *De Jure Belli et Pacis*, lib. ii. c. iii. § 16, 17; Vattel, liv. i. ch. xxii. § 267-77; Phillimore, i. § ccxxxviii-ix; Halleck, i. 146; Calvo, § 233; Bluntschli, § 295-99. Mud islands at the mouth of the Mississippi, some of which seem to have been outside the three-mile limit, were held by Lord Stowell to be in the territory of the United States in the case of the *Anna*, v *Rob.* 373.

must give evidence of its title, either by producing treaties, or by showing that it has exercised continuous ownership over the waters claimed. Upon whatever grounds property in the entirety of a stream or lake is established, it would seem in all cases to carry with it a right to the opposite bank as accessory to the use of the stream, and perhaps it even gives a right to a sufficient margin for defensive or revenue purposes, when the title is derived from occupation, or from a treaty of which the object is to mark out a political frontier. In 1648 Sweden, by receiving a cession of the river Oder from the Empire under the Treaty of Osnabrück, was held to have acquired territory to the extent of two German miles from its bank as an inseparable accessory to the stream; and in the more recent case of the Netze in 1773 Prussia claimed with success that the cession of the stream should be interpreted to mean a cession of its shore. Where however the property in a river is vested by agreement in one of two riparian states for the purpose of bringing to an end disputes arising out of the use of its waters for mills and factories, as in the case of a treaty concluded in 1816 between Sardinia and the Republic of Geneva by which the Foron was handed over to the latter, it would be unreasonable to interpret a convention as granting more than what is barely necessary for its object<sup>1</sup>.

<sup>1</sup> Grotius, lib. ii. c. iii. § 18; Wolff, *Jus Gentium*, § 106-7; Vattel, liv. i. ch. xxii. § 266; De Martens, *Précis*, § 39; The Twee Gebroeders, iii Rob. 339-40; Bluntschli, § 297-8, 301; Twiss, i. § 143-4. An instance of property by occupation is afforded by the appropriation of the river Paraguay, between the territory of the Republic of Paraguay and the Gran Chaco, which was effected by the Republic, and maintained until after its war with Brazil and the Argentine Confederation.

Sir Travers Twiss points out with justice that the doctrine which regards the shore as attendant upon the river, when the latter is owned wholly by one power, might lead, if generally applied, to great complications; and indicates that when it is wished to keep the control of a river in the hands of one only of the riparian powers, it is better to make stipulations such as those contained with respect to the southern channel of the Danube in the Treaty of Adrianople, than to allow the common law of the matter to operate. By that treaty it was agreed that the right bank of the Danube from the confluence of the

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Whether  
rights of  
navigation  
are pos-  
sessed by  
states over  
rivers, or  
portions of  
rivers, not  
within  
their ter-  
ritory.

§ 39. The general principle that a state possesses absolute proprietary rights over the whole area included within its frontier might be supposed to lead inevitably to the admission of a right on the part of every country to deal as it chooses with its navigable rivers, and consequently to prevent other states from navigating them, or to subject navigation to conditions dictated by its real or imagined interests, whether the navigable portion of a particular river is wholly included within its own boundaries, or whether the river begins to be navigable before they are reached. Conversely it might be supposed that neither foreign states in general nor co-riparian states could have any rights over waters contained within a specific territory, except through prescription or express agreement in the case of a particular river, or through an express agreement between the whole body of states with reference to all rivers.

It is generally asserted however that co-riparian states, and it is frequently said that states entirely unconnected with a river, have a right of navigation for commercial purposes, which sometimes is represented as imperfect, but sometimes also is declared to be dominant. Grotius alleged that on the establishment of separate property, which he imagined to have supervened upon an original community of goods as the result of convention, certain of the pre-existing natural rights were reserved for the general advantage, of which one was a right to use things which had become the subject of separate property in any manner not injurious to their owners. Passage over territory, whether by land or water, whether in the form of navigation of rivers for

Pruth to the St. George's mouth should continue to belong to Turkey, but that it should remain uninhabited for a distance inland of about six miles, and that no establishments of any kind should be formed within the belt of land thus marked out. Stipulations of such severity could rarely be needed, and in most cases could not be carried out; but the end aimed at, viz. the prevention of any use of the borders of the river for offensive or defensive purposes, and of any interference with navigation, could be obtained by prohibiting the erection of forts within a certain distance of the banks, and if necessary by specifying the places to which highroads or railways might be brought down.



commercial purposes or of the march of an army over neutral ground to attack an enemy, was regarded by him as an innoxious use, and consequently as a privilege the concession of which it is not competent to a nation to refuse<sup>1</sup>. Whatever may be the value of this doctrine, it is the root of such legal authority as is now possessed by the principle of the freedom of river navigation. It was echoed with slight variations by most of the writers of the seventeenth and eighteenth centuries<sup>2</sup>, and when states have been engaged in the endeavour to open a closed section of river to the trade of their subjects, the weapons of international controversy have been drawn in the main from the arsenal provided by the assumptions of Grotius and his successors.

After the Treaty of Paris in 1783, for example, both banks of the lower portion of the Mississippi having fallen under the dominion of Spain, and that power having closed the navigation of the part belonging to it to the inhabitants of the upper shores, a dispute took place on the subject between it and the United States. On behalf of the latter it was pointed out with truth that the passage of merchandise to and from the higher waters of the river would be not only innocent, but of positive advantage to the subjects of Spain; and it was argued with more questionable force that the freedom of 'the ocean to all men and of its rivers to all the riparian inhabitants' is a 'sentiment written in deep characters on the heart of man,' and that though the right of passage thus evidenced may be so far imperfect as to be 'dependent to a considerable degree on the conveniency of the nation through which' persons using it were to pass, it was yet a right so real that an injury would be inflicted,

Contro-  
versy with  
respect to  
the Missis-  
sippi,

<sup>1</sup> Lib. ii. ch. ii. § 2, 10, and 13.

<sup>2</sup> E.g. Loccenius, *De Jure Maritimo*, lib. i. c. 6; Rutherford, *Institutes of Natural Law*, bk. ii. ch. ix; Wolff, *Jus Gent.* § 343; Vattel, liv. ii. ch. ix. § 117, 128-9, and ch. x. § 134.

Gronovius and Barbeyrac, on the other hand, in their notes to Grotius imply the right to prohibit navigation by conceding that of levying dues for the simple permission to navigate.



## PART II.

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the St.  
Lawrence.

for which it would be proper to exact redress, if passage were 'refused, or so shackled by regulations not necessary for the peace or safety of the inhabitants as to render its use impracticable<sup>1</sup>.' Again, in 1824, a series of negotiations were commenced between the United States and Great Britain with reference to the St. Lawrence, a right of navigating which was asserted by the former country as a riparian state of the upper waters of the river, and of the lakes which feed it. The arguments employed in support of the American contention were essentially the same as those which had been put forward in the case of the Mississippi. 'The right of the upper inhabitants,' it was said, 'to the full use of a stream rests upon the same imperious want as that of the lower, upon the same inherent necessity of participating in the benefit of the flowing element;' it is therefore 'a right of nature,' its existence is testified by the 'most revered authorities of ancient and modern times,' and when it has been disregarded, the interdiction of a stream to the upper inhabitants 'has been an act of force by a stronger against a weaker party.' Proprietary rights, on the other hand, 'could at best be supposed to spring from the social compact<sup>2</sup>.'

Examina-  
tion of the  
doctrine  
that rights  
of naviga-  
tion exist.

Putting aside the assumption that an original convention as to several property was made between mankind, under which a right to use navigable waters was expressly reserved, as a theory which can no longer be taken by any one as an argumentative starting-point; part of the foregoing reasoning, and the doctrine of writers who maintain the right of

<sup>1</sup> Wheaton's History of the Law of Nations, 508-9; see also Jefferson's Instructions to the Commissioners appointed to negotiate with the Court of Spain, Am. State Papers, x. 135.

The dispute was ended in 1795 by the Treaty of San Lorenzo el Real, which opened the portion of the Mississippi belonging to Spain to the navigation of the United States.

<sup>2</sup> British and Foreign State Papers, 1830-1, p. 1067-75. The proprietary rights exercised until after the Congress of Vienna by some of the petty German States, as for instance by Anhalt-Coethen and Anhalt-Bernburg, to the prejudice of Austria and Saxony, offer singular examples of 'acts of force done by a stronger against a weaker party.'

access and passage on the part of all states, depend upon the principle that the proprietary rights of individual states ought to be subordinated to the general interests of mankind, as the proprietary rights of individuals in organised societies are governed by the requirements of the general good; and the reasoning and doctrine in question involve the broad assertion that the opening of all water-ways to the general commerce of nations is an end which the human race has declared to be as important to it as those ends, to which the rights of the individual are sacrificed by civil communities, are to the latter. Put in this form the doctrine has a rational basis, whether the assumption of fact by which it is accompanied is correct or not. But part of the foregoing reasoning on the other hand, and the opinion of writers who accord the right of navigation to co-riparian states, seem to imply the supposition that the fact of the use of a section of river belonging to a particular community being highly advantageous to the inhabitants of lands traversed by another portion of the stream in some way confers upon them a special right of use. The erroneousness of this view, when once it is plainly stated, can hardly require to be proved. The mere wants, or even the necessities, of an individual can give rise to no legal right as against the already existing rights of others. To infringe these rights remains legally a wrong, however slight in some cases may be the moral impropriety of the action. If a state forces the opening of a water-way between itself and the sea, on the ground that it has a right to its use as a riparian state, it simply commits a trespass upon its neighbour's property, which may or may not be morally justified, but by which it violates the law as distinctly, though not so noxiously, as an individual would violate it by making a track through a neighbour's field to obtain access to a high road. Some writers, who appear to be embarrassed with the difficulties with which the claim of a right to navigate private waters is beset, envelope their assertion of it with an indistinctness

PART II. of language through which it is hard to penetrate to the  
 CHAP. II. real meaning. A right, it is alleged, exists; but it is an  
 — imperfect one, and therefore its enjoyment may always be  
 subjected to such conditions as are required in the judgment  
 of the state whose property is affected, and for sufficient cause  
 it may be denied altogether. Whatever may be thought  
 of the consistency of one part of this doctrine with another,  
 there is in effect little to choose between it and the opinion  
 of those who consider that the rights of property in navigable  
 rivers have not as a matter of fact been modified with a view  
 to the general good, and that they are independent of the  
 wants of individuals other than the owners, but who recognise  
 that it has become usual as a matter of comity to permit  
 navigation by co-riparian states, and that it would be a  
 vexatious act to refuse the privilege without serious cause<sup>1</sup>.

<sup>1</sup> The opinions of writers belonging to the present century are singularly varied, and are not always internally consistent. Bluntschli (§ 314) roundly alleges that '*les fleuves et rivières navigables qui sont en communication avec une mer libre, sont ouverts en temps de paix aux navires de toutes les nations.*' Calvo (§ 215, 229-30) says that where a river traverses more than one territory, '*le droit de naviguer et de commercer est commun à tous les riverains;*' when it is wholly within the territory of a single state, '*il est considéré comme se trouvant sous la souveraineté exclusive de ce même état;*' it is however to be understood that '*les réglemens particuliers ne doivent pas assumer un caractère de fiscalité, et que l'autorité ne saurait intervenir que pour faciliter la navigation et faire respecter les droits de tous,*' so that the right of property seems in the end to be subordinated to the right of navigation. Heffter (§ 77) declares on the one hand that each of the proprietors of a river flowing through several states '*de même que le propriétaire unique d'un fleuve, pourrait, stricto jure, affecter les eaux à ses propres usages et à ceux de ses regnicoles, et en exclure les autres,*' and on the other hand that '*on reconnaît avec Grotius, Pufendorf, et Vattel, au moins en principe, un droit beaucoup plus étendu, celui d'usage et de passage innocent, lequel ne peut être refusé absolument à aucune nation amie et à ses sujets dans l'intérêt du commerce universel.*' Wheaton (Elem. pt. ii. ch. iv. § 11) considers that '*the right of navigating for commercial purposes a river which flows through the territories of different states is common to all the nations inhabiting the different parts of its banks;* but this right of innocent passage being what the text writers call an imperfect right, its exercise is necessarily modified by the safety and convenience of the state affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise.' Halleck (i. 147-8) says that '*the right of navigation for commercial purposes is common to all the nations inhabiting the banks*' of a navigable river, subject to such provisions as are necessary to secure

The question remains with what views the practice of states is most in accordance. Down to the commencement of the present century there can be no doubt that the paramount character of the rights of property were both recognised and acted upon. Although none of the European rivers running through more than one state seem at any part of their course to have been entirely closed to the riparian states, except the Scheldt which was closed by treaty, their navigation by foreign vessels was burdened with passage tolls and dues levied in commutation of the right of compulsory transshipment of cargoes. The first step towards freeing traffic was made in 1804, when the various Rhine tolls were abolished at the Congress of Rastadt, on the demand of the French government. In 1814 it was declared by the Treaty of Paris that the navigation of the Rhine should be free to all the world, and that the then coming Congress should examine

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states.

'the safety and convenience' of the several states affected. De Martens (Précis, § 84) thinks that as a general rule the exclusive right of each nation to its territory authorises a country to close its entry to strangers, and though it is wrong to refuse them innocent passage, it is for the state itself to judge what passage is innocent, but at the same time the geographical position of another state may give it a right to demand and in case of need to force a passage for the sake of its commerce. The opinion of Fiore (i. 356) is in effect the same. Woolsey (§ 58) says, 'When a river rises within the bounds of one state and empties into the sea in another, international law allows to the inhabitants of the upper waters only a moral claim or imperfect right to its navigation. We see in this a decision based on strict views of territorial right, which does not take into account the necessities of mankind and their destination to hold intercourse with one another.' Phillimore (i. § clxx), in speaking of the refusal of England to open the St. Lawrence unconditionally to the United States, says that 'it seems difficult to deny that Great Britain may ground her refusal upon strict law, but it is equally difficult to deny that in doing so she exercises harshly an extreme and hard law.' Klüber (§ 76) considers that '*l'indépendance des états se fait particulièrement remarquer dans l'usage libre et exclusif du droit des eaux, tant dans le territoire maritime de l'état, que dans ses rivières, fleuves, canaux, lacs et étangs. . . . On ne pourrait l'accuser d'injustice s'il défendait tout passage de bateaux étrangers sur les fleuves, rivières, canaux ou lacs de son territoire.*' Finally, Twiss (i. § 141) lays down that 'a nation having physical possession of both banks of a river is held to be in juridical possession of the stream of water contained within its banks, and may rightfully exclude at its pleasure every other nation from the use of the stream while it is passing through its territory.'

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and determine in what manner the navigation of other rivers might be opened and regulated. By an annex to the Act of the Congress of Vienna it was consequently agreed by the powers that navigable rivers separating or passing through more than one state should for the future be open to general navigation, subject only to moderate navigation dues. But neither at the Congress of Vienna nor in the Treaty of Paris was the right of co-riparian or of other foreign states to navigate territorial waters asserted as an existing principle, and effect was given to the intention of the powers in a series of conventions made between the states concerned. The Congress of Vienna therefore, though it intended to establish the principle of free navigation with regard to European rivers, respected the right of property in its mode of action, and it stopped short of applying the principle to rivers lying wholly within one state<sup>1</sup>. It would be difficult to show that any European country has admitted the propriety of the latter application ; and in America, although the navigation of the great rivers of the United States is as a matter of fact open to foreign vessels for foreign trade, the government of that country appears to deny expressly that any right of such navigation exists. England again has always steadily refused to concede the navigation of the St. Lawrence to the United States as of right, and a controversy which existed for many years upon

<sup>1</sup> De Martens, Rec. viii. 261 and Nouv. Rec. ii. 427, and 434. A list of the conventions dealing with the navigation of rivers separating or passing through different states is given by Heffter, Appendix viii.

In the text the intention of the Treaties of Paris and Vienna has been taken to be that which has been generally assumed and which is most in accordance with their language, but M. Engelhardt in the *Revue de Droit International* for 1879 (p. 363-81) gives reason to doubt whether it was intended at the time to give so complete a liberty of navigation as has been supposed, and shows that many of the regulations, to which the navigation of various European rivers passing through more than one state has been and is subjected, are inconsistent with the principle which was apparently laid down. M. Engelhardt is a warm advocate of the freedom of river navigation, but he is too accurate to regard it as legally established, and he admits that '*les libertés fluviales, telles qu'on les pratique aujourd'hui, sont essentiellement conventionnelles.*'

the subject was only put an end to in 1854 by a treaty which granted its navigation as a revocable privilege, and as part of a bargain in which other things were given and obtained on the two sides<sup>1</sup>. PART II.  
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In South America the rivers of the Argentine Confederation were closed to foreign ships until 1853, when the Parana and Paraguay, in so far as they lie within Argentine territory, were opened for external trade to the commercial ships of all nations by treaties made between the Confederation and England, France, and the United States; subsequently in 1857 in a treaty with Brazil the navigation of those portions of both rivers, as well as the part of the Uruguay belonging to the two countries, was declared free, except for local traffic; but the navigation of their affluents was expressly reserved. The Republic of Uruguay had already by decree opened its internal waters to foreign commerce in 1853. Finally, the navigation of the Amazons, though partially opened by Brazil in 1851 to the co-riparian state of Peru, remained closed, not only to non-riparian states, but to Ecuador, until 1867, when an imperial decree admitted all foreign vessels to the navigation of the Amazon, the Tocantins, and the San Francisco<sup>2</sup>.

From the foregoing facts it appears that there are few cases in which rivers wholly within one state have been opened; that where rivers flowing through more than one state are now open, they have usually at some time either been closed, or their navigation has been subjected to restrictions or tolls of a kind implying that navigation by foreigners was not a right but a privilege; that there are still cases in which local traffic is forbidden to non-riparians; and that the opening of a river, when it has taken place, having been effected either by convention or decree has always been consistent with, and has sometimes itself formed, an assertion of the paramount right of property, or in other words of the right of the owner of navigable waters to open or close them Conclu-  
sions.

<sup>1</sup> De Martens, *Nouv. Rec. Gén.* xvi. i. 498.

<sup>2</sup> Calvo, § 227-8.

**PART II.** at will. It is clear therefore that the principle of the freedom  
**CHAP. II.** of territorial waters, communicating with the sea, to the  
 navigation of foreign powers has not been established either by usage or by agreements binding all or most nations to its recognition as a right. It is not less clear from the analysis of the views of its advocates which has been made in the earlier part of the section that, if not so established, it has not been established at all ; because the only reasonable basis on which it can be founded requires mankind to have declared that in the case of navigable rivers the ordinary rules of accepted law must be overridden for the sake of the general good. A marked tendency has no doubt shown itself during the present century to do away with prohibition, or to lessen restrictions, of river navigation by foreigners as a needless embarrassment to trade, but this has been the result, not of obedience to law, but of enlightened policy; and it may be said without hesitation that so far as international law is concerned a state may close or open its rivers at will, that it may tax or regulate transit over them as it chooses, and that though it would be as wrong in a moral sense as it would generally be foolish to use these powers needlessly or in an arbitrary manner, it is morally as well as legally permissible to retain them, so as to be able when necessary to exercise pressure by their means, or so as to have something to exchange against concessions by another power.

To what  
 extent the  
 sea can be  
 appro-  
 priated.

§ 40. It has become an uncontested principle of modern international law that the sea as a general rule cannot be subjected to appropriation. It is at the same time almost universally considered that portions of it are affected by proprietary rights on the part of the states of which the territory is washed by it ; but no distinct understanding has yet been come to as to the extent which may be appropriated, or which may be considered to be attendant on the bordering land. In order to comprehend the uncertain application which the rights of appropriation and of retention as property thus receive in relation to the sea, it is necessary to form a clear conception of



the manner in which the views now commonly held have been gradually arrived at. PART II.  
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At the beginning of the seventeenth century it is probable that no part of the seas which surround Europe was looked upon as free from a claim of proprietary rights on the part of some power, and over most of them such rights were exercised to a greater or less degree. In the basin of the Mediterranean the Adriatic was treated as part of the dominion of Venice; the Ligurian sea belonged to Genoa, and France still claimed to some not very well defined extent the waters stretching outwardly from her coast. England not only asserted her dominion over the Channel, the North Sea, and the seas outside Ireland, but more vaguely claimed the Bay of Biscay and the ocean to the north of Scotland. The latter was disputed by Denmark, which considered the whole space between Iceland and Norway to belong to her. Finally, the Baltic was shared between Denmark and Sweden<sup>1</sup>. In their origin these claims were no doubt founded upon services rendered to commerce. It was to the advantage of a state to secure the approaches to its shores from the attacks of pirates, who everywhere swarmed during the Middle Ages; but it was not less to the advantage of foreign traders to be protected. A right of control became established and recognised; and in attendance upon it naturally came that of levying tolls and dues to recompense the protecting state for the cost and trouble to which it was put. From this, as a

<sup>1</sup> Daru, *Hist. de Venise*, liv. v. § 21; Selden, *Mare Clausum*, lib. ii. c. 30-2; Loccenius, *De Jure Marit.* lib. i. c. 4. In 1485 it was agreed in a treaty between John II of Denmark and Henry VII that English vessels should fish in and sail over the seas between Norway and Iceland on taking out licences, which required to be renewed every seven years (Selden, *Mare Clausum*, lib. ii. c. 32). In the sixteenth century intestine wars in Scandinavia led to so long an enjoyment of the fisheries of the northern seas without licence by the English, that the latter set up a title to their use by prescription, in addition as it would seem to the claim of exclusive sovereignty over the seas in which they lay. Denmark maintained her pretensions, and some ill-treatment of English fishermen by the Danes gave rise to a serious dispute between the two countries (Justice, *Dominion and Laws of the Sea* (1705), p. 168, and Rymer, *Fœdera*, xvi. 395).



PART II. dissociation of the ideas of control and property was not then  
 CHAP. II. intelligible, the step to the assertion of complete rights of  
 — property was almost inevitable. The acts of control, it must  
 be remembered, apart from those required for the protection  
 of commerce, were often not only very real, but quite as solid  
 as those upon which a right of feudal superiority was fre-  
 quently supported. In 1269, for example, Venice began to  
 exact a heavy toll from all vessels navigating the Northern  
 Adriatic. After paying the impost for a few years, Bologna  
 and Ancona took up arms to free themselves from the burden,  
 but the issue of their wars being unfortunate, they were com-  
 - pelled formally to acknowledge the sovereignty of Venice over  
 the Adriatic, and to consent to pay the dues which she  
 demanded. In 1299, it appears from a memorial presented  
 to certain commissioners sitting in Paris to redress damages  
 done to merchants of various nations by a French Admiral  
 within the English seas, that procurators of the merchants  
 and mariners of Genoa, Catalonia, Spain, Germany, Zeeland,  
 Holland, Friesland, Denmark, and Norway, acknowledged  
 that exclusive dominion over the English seas, and the  
 right of 'making and establishing laws and statutes and  
 restraints of arms' and 'all other things which may apper-  
 tain to the exercise of sovereign dominion' over them, were  
 possessed by England. For nearly three centuries afterwards  
 England kept the peace of the British seas either by cruisers  
 in constant employment, or by vessels sent out from time  
 to time<sup>1</sup>.

Sixteenth  
 century.

At the period then when international law came into  
 existence the common European practice with respect to  
 the sea was founded upon the possibility of the acquisition  
 of property in it, and it was customary to look upon most

<sup>1</sup> Daru, loc. cit.; Boroughs, *The Sovereignty of the British Seas* (1633), p. 28, and Justice, 134. The narrow seas were 'constantly kept' in the time of Boroughs, but at that date the ships so employed seem to have been stationed mainly for the purpose of receiving the salute. He however expressly says that within his memory ships were sent out to keep the peace of the seas; p. 61.

seas as being in fact appropriated. But during the preceding century the exorbitant pretensions of Spain and Portugal had been preparing a reaction against this view. The former asserted dominion over the Pacific and the Gulf of Mexico, the latter declared the Indian Ocean and all the Atlantic south of Morocco to belong to it; while both pushed the exercise of proprietary rights to the extent of prohibiting all foreigners from navigating or entering their waters<sup>1</sup>. The claims of Portugal and Spain received a practical answer in the predatory voyages of Drake and Cavendish, and the commerce of Holland with the East; and in the region of argument they were met by the affirmation of the freedom of the seas. When Mendoza, the Spanish envoy at the English court, complained to Queen Elizabeth of the intrusion of English vessels in the waters of the Indies, she refused to admit any right in Spain to debar her subjects from trade, or from 'freely navigating that vast ocean, seeing the use of the sea and air is common to all; neither can a title to the ocean belong to any people or private persons, forasmuch as neither nature nor public use and custom permitteth any possession thereof<sup>2</sup>.' Elizabeth was indifferent to consistency. If the principle which she enunciated was correct, it applied as fully to the British seas as to those of the Indies. It was essentially the same as that on which Grotius relied in his attack upon the Portuguese in the 'Mare Liberum.' All property, he says, is grounded upon occupation, which requires that moveables shall be seized and that immoveable things shall be enclosed; whatever therefore cannot be so seized or enclosed is incapable of being made a subject of property. The vagrant

<sup>1</sup> Charles V styled himself 'Insularum Canariæ, necnon insularum Indiarum et terræ firmæ, maris oceani, &c. rex.' Selden, *Mare Clausum*, cap. xvii. Ortolan (*Dip. de la Mer*, i. 121) gives the text of a Portuguese Ordonnance of pains and penalties: 'Assi natural como estrangeiro, ditas partes, terras, mares, de Guinea et Indias, et qualquier outras terras et mares et lugares de nossa conquista, tratar, resgatar, nem guerrear, sem nossa licença et autoridade sob pena que fazendo o contrario moura por ello morte natural et por esso mesmo feito percapera nos todos seus beens moveis et de rays.'

<sup>2</sup> Camden, *Hist. of Eliz.*, year 1580.

PART II. waters of the ocean are thus necessarily free. The right of  
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 — occupation, again, rests upon the fact that most things become exhausted by promiscuous use, and that appropriation consequently is the condition of their utility to human beings. But this is not the case with the sea; it can be exhausted neither by navigation nor by fishing, that is to say in neither of the two ways in which it can be used<sup>1</sup>.

Seven-  
 teenth  
 century.

The doctrine with which the pretensions of Spain and Portugal was met went further than was necessary for the destruction of those pretensions, and it went further than any nation except Holland, which was imprisoned within the British seas, cared much to go. The world was anxious to secure the right of navigation, but it was willing that states should enjoy the minor rights of property and the general rights of sovereignty which accompany national ownership. Selden combated the views of Grotius in the interests of England; but while he maintained the right of appropriation in principle and as a customary fact, he declared that a state could not forbid the navigation of its seas by other peoples without being wanting to the duties of humanity<sup>2</sup>. The remaining jurists of the seventeenth century are in agreement with him. Molloy may be exposed to suspicion as an Englishman, but the opinion of Loccenius and Pufendorf is independent<sup>3</sup>. The latter argues that fluidity is not in itself a bar to property, as is proved by the case of rivers; that though the sea is inexhaustible for some purposes, its fish, and the pearls, the coral, and the amber that it yields, are not inexhaustible, and that 'there is no reason why the borderers

<sup>1</sup> *Mare Liberum*, cap. 5. The treatise was first published in 1609. In his subsequent work, *De Jure Belli*, the doctrine is repeated (lib. ii. cap. ii. § 3), but with the illogical qualification (cap. iii. § 8) that gulfs and straits of which both shores belong to the same power can be occupied, because of their analogy to rivers, provided that the area of water is small in comparison to that of the land upon which it is attendant.

<sup>2</sup> *Mare Clausum*, lib. i. c. 20.

<sup>3</sup> Molloy, *De Jure Marit.* cap. v; Loccenius, lib. i. cap. iv; Pufendorf, bk. iv. ch. iv. § 6-9.

should not rather challenge to themselves the happiness of a wealthy shore or sea than those who are seated at a distance from it;’ finally, that the sea is a defence, ‘for which reason it must be a disadvantage to any people that other nations should have free access to their shores with ships of war without asking their leave, or without giving security for their peaceful and inoffensive passage.’ The extent over which dominion exists in any particular case is to be determined from the facts of effective possession or from treaties, and in cases which, after the application of these tests, are doubtful, it is to be presumed that the sea belongs to the states bordering on it so far as may be necessary for their defence, and that they also own all gulfs and arms.

In practice there was no radical change during the earlier part of the seventeenth century, except that as the seas had become safer, it was no longer necessary to keep their peace. Those consequences of the existence of property which made for the common good disappeared, while those which were onerous remained. Venice preserved her control over the Adriatic, and so jealous was she even of the semblance of a derogation from it, that in 1630 the Infanta Maria, when about to marry the King of Hungary and son of the Emperor, was not allowed to go to Triest on board her brother’s fleet, but was obliged unwillingly to accept the hospitality and the escort of Venetian vessels<sup>1</sup>. In 1637 Denmark seized vessels placed outside Dantzic by the King of Poland to levy duties on merchantmen entering; she also increased the dues payable on passing the Sound, apparently to an excessive point, since wars with Sweden, Holland, and the Hanse Towns followed, which resulted in the exemption of Swedish ships, and in the regulation of the amount to be paid by the Dutch; and there can be little doubt that Danish pretensions in the northern seas were maintained, since the disputes with England which occurred in the sixteenth century were renewed,

<sup>1</sup> Daru, *loc. cit.*

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as will be seen presently, in the eighteenth<sup>1</sup>. England continued to require that foreigners intending to fish in the German Ocean should take out English licences, and when the Dutch attempted in 1636 to fish without them, they were attacked and compelled to pay £30,000 for leave to remain<sup>2</sup>. Though a refusal to accord the honours of the flag, by which maritime sovereignty was symbolised, in part caused the war of 1652 between England and Holland, and furnished a pretext for that of 1672, the latter power in the first instance only endeavoured to escape from performing an humiliating ceremony as due to a commonwealth which it admitted would have been due to an English king; and in the end it acknowledged its obligation in the Treaties of Westminster of 1654, of Breda, and of Westminster of 1674, in the last of which it was expressly recognised that the British seas extended from Cape Finisterre to Stadland in Norway<sup>3</sup>.

<sup>1</sup> Treaty of Christianopol, 1645 (Dumont, *Corps Universel Diplomatique du Droit des Gens*, vi. i. 312), and of Bromsebro in the same year (id. 314).

<sup>2</sup> Proclamation of 1609 and one issued by Charles I, mentioned by Molloy, ch. v. § 15; Hume, *Hist. of England*, ch. lii.

<sup>3</sup> Lingard, *Hist. of England*, vol. xi. ch. ii; Hume, *Hist. of England*, ch. lxxv; Dumont, vi. ii. 74, vii. i. 44 and 253. It was stipulated in the Treaty of Westminster that '*praedicti Ordines generales Unitarum Provinciarum debite, ex parte sua agnoscentes jus supra memorati Serenissimi Domini Magnae Britanniae Regis, ut vexillo suo in maribus infra nominandis honos habeatur, declarabunt et declarant, concordabunt et concordant, quod quaecunque naves et navigia ad praefatas Unitas Provincias spectantia, sive naves bellicae, sive aliae eaeque vel singulae, vel in classibus junctae, in ullis maribus a Promontorio Finis Terrae dicto usque ad medium punctum terrae van Staten dictae in Norwegia quibuscumque navibus aut navigiis ad Serenissimum Dominum Magnae Britanniae Regem spectantibus, obviam dederint, sive illae naves singulae sint, vel in numero majori, si majestatis Britannicae, sive aplustrum, sive vexillum Jack appellatum gerant, praedictae Unitarum Provinciarum naves aut navigia vexillum suum e mali vertice detrahentes supremum velum demittent, eodem modo parique honoris testimonio, quo ullo unquam tempore, aut in alio loco antehac usitatum fuit, versus ullas Majestatis Britannicae suae aut antecessorum suorum naves ab ullis Ordinum Generalium suorumve antecessorum navibus.*'

Even crowned heads in person were expected to make practical acknowledgment of the dominion of England. Philip II of Spain, when coming to marry Queen Mary, was fired into by the English Admiral who met him for flying his own royal flag within the British seas; and in 1606 the King of Denmark, when

Between the beginning and the end of the seventeenth century however, notwithstanding the strenuousness with which England upheld her title to the British seas, so far as the salute due to her flag was concerned, there was on the whole a marked difference in the degree to which proprietary rights over the open sea were maintained. At the latter time they were everywhere dwindling away. By the commencement of the nineteenth century they had almost disappeared. England was embarrassed by the shadow of her claims, but she made no serious attempt to preserve the substance. The negotiations with the United States for a settlement of the question of the right of search, which had almost been brought to a satisfactory conclusion in 1803, were broken off at the last moment because the English government could not make up its mind to concede freedom from search within the British seas<sup>1</sup>; and so late as 1805 the Admiralty Regulations contained an order to the effect that 'when any of His Majesty's ships shall meet with the ships of any foreign power within His Majesty's seas (which extend to Cape Finisterre) it is expected that the said foreign ships do strike their topsail and take in their flag, in acknowledgment of His Majesty's sovereignty in those seas; and if any do resist, all flag officers and commanders are to use their utmost endeavours to compel them thereto, and not suffer any dishonour to be done to His Majesty.' Since no controversies arose with respect to the salute at a time when opinion had become little favourable to the retention of such a right, it may be doubted whether the order was not allowed to remain a dead letter; and from that time, at any rate, nothing has been heard of the last remnant of the English claims. The pretensions of Denmark to the northern seas shrank in the course of the eighteenth century into a prohibition of fishery within sixty-nine miles of Greenland and Iceland; but the returning from a visit to James I, was met off the mouth of the Thames by an English captain, who forced him to strike his flag.

<sup>1</sup> Mr. King to Mr. Madison, British and Foreign State Papers, 1812-14, p. 1404.

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seamen of England and Holland disregarded the Danish ordinances; when their vessels were captured they were supported by their governments; and though some threats of war were uttered, in the end the fishing-grounds were tacitly opened. The Baltic was the only other of the larger seas in which any endeavour was made to keep proprietary rights in existence. Denmark and Sweden tried to shut it against hostilities between powers not possessing territory on its shores, but the attempt failed before the maritime predominance of England, and the claim may be considered to have been abandoned with the commencement of the present century<sup>1</sup>.

2. Opinion  
of writers.

If we turn from history to the treatises of the eighteenth century the tendency to narrow the range of maritime occupation is perhaps still more strongly pronounced, though from the principles laid down being much too large to allow of admitted positive rules being brought into harmony with them, there is often some difficulty in knowing how far the writers who profess them would go. It is commonly stated that the sea cannot be occupied; it is indivisible, inexhaustible, and productive, in so far as it is productive at all, irrespectively of the labour of man; it is neither physically susceptible of allotment and appropriation; nor is there the reason for its appropriation which induced men to abandon the original community of goods<sup>2</sup>. If these objections to

<sup>1</sup> In 1780 Denmark declared that '*le Roi a résolu pour entretenir la libre et tranquille communication entre ses Provinces de déclarer que la mer Baltique étant une mer fermée, incontestablement telle par sa situation locale,*' &c. (De Martens, Rec. iii. 175); and in 1794 Sweden and Denmark agreed by a Convention that '*la Baltique devant toujours être regardée comme une mer fermée et inaccessible à des vaisseaux armés des parties en guerre éloignées est encore déclarée telle de nouveau par les parties contractantes décidées à en préserver la tranquillité la plus parfaite*' (id. v. 608).

A new claim subsequently sprung up in the Pacific, but it was abandoned in a very short time. The Russian government pretended to be sovereign over the Pacific north of the 51st degree of latitude. This pretension being resisted by Great Britain and the United States, the area claimed was reduced to a zone of a hundred Italian miles from shore by an Ukase of 1821 (De Martens, Nouv. Rec. v. ii. 358), and was wholly given up by a Convention between the former powers and Russia in 1825 (id. vi. 684).

<sup>2</sup> Wolff, Jus Gentium, § 127, &c.; Vattel, liv. i. ch. xxiii. § 281; De Martens,



proprietary rights over the sea are sound they apply as much to one portion of it as to another. It might be expected therefore that the right of maritime occupation would be wholly denied. But it is not so. Enclosed seas, straits, and littoral seas were regarded as susceptible of occupation. The right of Sweden to the Gulf of Bothnia, of the Turks to the Archipelago, of England to St. George's Channel, of Holland to the Zuyder Zee, and of Denmark to both the Belts and to the Sound, was, it seems, 'uncontested<sup>1</sup>;' and a margin varying in width from gunshot or a marine league from the shore to a space bounded by the horizon, or even according to one authority by a line a hundred miles from the coast, was universally conceded<sup>2</sup>. The parts of the sea which are thus excepted are large, so large indeed that they bring down the doctrines of jurists to very nearly the same results as are given by usage. It is evident that the minds of writers were still influenced by the traditional view that occupation is permitted in principle. Their word-play about the fluidity of water was really only intended to limit appropriation of the sea to those parts of it which could in fact be kept under the control of a state. It was admitted, even by those who most uncompromisingly assert the sea to be insusceptible of appropriation, that such parts of it as may be necessary to the safety of a state may be controlled. No

*Précis*, § 43. Bynkershoek (*De Dominio Maris*, c. ii), Lampredi (*Jur. Pub. Univ. Theorem.* p. ii. cap. ii. § 8, 9), Azuni (pt. i. ch. ii. art. 1) affirm the principle that the sea can be occupied in so far as it is used and guarded.

<sup>1</sup> De Martens, *Précis*, § 42.

<sup>2</sup> Bynkershoek (*De Dominio Maris*, c. ii), Valin (*Commentaire sur l'Ordonnance de la Marine*, ii. 688), Vattel (liv. i. ch. xxii. § 289), Moser (*Versuch des Neuesten Europäischen Völker-Rechts*, v. 486), Lampredi (*Jur. Pub. Univ.* p. iii. cap. ii. § 8), De Martens (*Précis*, § 153), and Lord Stowell in the *Twec Gebroeders*, iii Rob. 339, considered that the range of a cannon-shot, which was supposed to be a marine league, measured the breadth of territorial waters along the open coast. Rayneval thought the horizon was the boundary. Casaregis (*De Commercio Disc.* 136, i) pronounced for a hundred miles. Galiani, according to Azuni, and Azuni himself regarded the extent of permissible marginal appropriation to be an open question, which should be settled by treaties in each particular case. Azuni, pt. i. ch. ii. art. ii. § 14.



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one in truth was prepared unqualifiedly to abandon the view that the sea may be subjected to proprietary rights; still less was any one prepared definitely to accept the opposite doctrine with all its consequences. It was universally felt that states cannot maintain effective occupation at a distance from their shores, and that free commercial navigation had become necessary to the modern world. There was therefore a general willingness to declare the ocean to be free, and to consider states as holding waters, which might fairly be looked upon as territorial, subject to a right of navigation on the part of other states. But acceptance of the freedom of the open seas merely marked a stage in a gradual settlement of the conditions under which occupation, when applied to the sea, may be held to be valid; and recognition of the right of passage only saddled private property with a kind of servitude for the general good.

Summary  
of the  
course of  
opinion and  
practice  
down to the  
beginning  
of the  
nineteenth  
century.

Down to the beginning of the present century then, the course of opinion and practice with respect to the sea had been as follows. Originally it was taken for granted that the sea could be appropriated. It was effectively appropriated in some instances; and in others extravagant pretensions were put forward, supported by wholly insufficient acts. Gradually, as appropriation of the larger areas was found to be generally unreal, to be burdensome to strangers, and to be unattended by compensating advantages, a disinclination to submit to it arose, and partly through insensible abandonment, partly through opposition to the exercise of inadequate or intermittent control, the larger claims disappeared, and those only continued at last to be recognised which affected waters the possession of which was supposed to be necessary to the safety of a state, or which were thought to be within its power to command. Upon this modification of practice it may be doubted whether theories affirming that the sea is insusceptible of occupation had any serious influence. They no doubt accelerated the restrictive movement which took place, but outside the realm of books they never succeeded in establishing predominant

authority. The true key to the development of the law is to be sought in the principle that maritime occupation must be effective in order to be valid. This principle may be taken as the formal expression of the results of the experience of the last two hundred and fifty years, and when coupled with the rule that the proprietor of territorial waters may not deny their navigation to foreigners, it reconciles the interests of a particular state with those of the body of states. As a matter of history, in proportion as the due limits of these conflicting interests were ascertained the practical rule which represented the principle became insensibly consolidated, until at the beginning of the present century it may fairly be said that though its application was still rough it was definitively settled as law.

PART II.  
CHAP. II.

§ 41. It remains to see whether the rule is now applied more precisely, or, in the absence of sufficient precision, what would be a reasonable application of it.

Present  
state of  
the ques-  
tion as to

Of the marginal seas, straits, and enclosed waters which were regarded at the beginning of the present century as being susceptible of appropriation, the case of the first is the simplest. In claiming its marginal seas as property a state is able to satisfy the condition of valid appropriation, because a narrow belt of water along a coast can be effectively commanded from the coast itself either by guns or by means of a coast-guard. In fact also such a belt is always appropriated, because states reserve to their own subjects the enjoyment of its fisheries, or, in other words, take from it the natural products which it is capable of yielding. It may be added that, unless the right to exercise control were admitted, no sufficient security would exist for the lives and property of the subjects of the state upon land; they would be exposed without recognised means of redress to the intended or accidental effects of acts of violence directed against themselves or others by persons of whose nationality, in the absence of a right to pursue and capture, it would often be impossible to get proof, and whose state consequently could not be made

1. Mar-  
ginal seas;

PART II. responsible for their deeds. Accordingly, on the assumption  
 CHAP. II. that any part of the sea is susceptible of appropriation, no serious question can arise as to the existence of property in marginal waters<sup>1</sup>. Their precise extent however is not so certain. Generally their limit is fixed at a marine league from the shore; but this distance was defined by the supposed range

<sup>1</sup> In addition to the earlier writers previously quoted with reference to marginal waters, see Klüber, § 128-30; Wheaton, Elem. pt. ii. ch. iv. § 6 and 10; Halleck, i. 134; Phillimore, i. § cxcvi-vii; Bluntschli, § 302.

Some modern writers deny that states can have property in any part of the sea, but admit the existence either of sovereignty and jurisdiction, or of some measure of the latter only. Heffter (§ 74) supposes that '*la police et la surveillance de certains districts maritimes, dans un intérêt de commerce et de navigation, ont été confiées à l'état le plus voisin,*' and that '*l'intérêt de la sûreté peut en outre conférer à un état certains droits sur un district maritime.*' Ortolan (Dip. de la Mer, liv. ii. ch. 7 and 8), repeating the old arguments in favour of the view that the sea is insusceptible of appropriation, says, '*ainsi, le droit qui existe sur la mer territoriale n'est pas un droit de propriété; on ne peut pas dire que l'état propriétaire des côtes soit propriétaire de cette mer. . . . En un mot, l'état a sur cet espace non la propriété, mais un droit d'empire; un pouvoir de législation, de surveillance et de juridiction.*' Calvo (§ 201) alleges that '*pour résoudre la question (of the extent of territorial waters) d'une manière à la fois rationnelle et pratique, il faut d'abord, ce nous semble, ne pas perdre de vue que les états n'ont pas sur la mer territoriale un droit de propriété, mais seulement un droit de surveillance et de juridiction dans l'intérêt de leur défense propre ou de la protection de leurs intérêts fiscaux.*' Twiss (i. § 173) seems implicitly to adopt the same doctrine by saying that as '*the term territory in its proper sense is used to denote a district within which a nation has an absolute and exclusive right to set law, some risk of confusion may ensue if we speak of any part of the open sea over which a nation has only a concurrent right to set law, as its maritime territory.*'

If a correct impression is given by the historical sketch in the text, it is obvious that the doctrine of these writers is erroneous. It is besides open to the objections that—

1. It does not account for the fact that a state has admittedly an exclusive right to the enjoyment of the fisheries in its marginal waters.

2. As the rights of sovereignty or jurisdiction belonging to a state are in all other cases except that of piracy, which in every way stands wholly apart, indissolubly connected with the possession of international property, a solitary instance of their existence independently of such property requires to be proved, like all other exceptions to a general rule, by reference to a distinct usage, which in this case cannot be shown.

Sir Travers Twiss appears to be unduly affected by the existence of certain immunities from local jurisdiction which there is no difficulty in regarding as exceptional.

Grotius (De Jure Belli et Pacis, lib. ii. c. iii. § 13) is the source of the doctrine.

of a gun of position, and the effect of the recent increase in the power of artillery has not yet been taken into consideration, either as supplying a new measure of the space over which control may be efficiently exercised, or as enlarging that within which acts of violence may be dangerous to persons and property on shore. It may be doubted, in view of the very diverse opinions which have been held until lately as to the extent to which marginal seas may be appropriated, of the lateness of the time at which much more extensive claims have been fully abandoned, and of the absence of cases in which the breadth of territorial water has come into international question, whether the three-mile limit has ever been unequivocally settled; but in any case, as it has been determined, if determined at all, upon an assumption which has ceased to hold good, it would be pedantry to adhere to the rule in its present form; and it is probably safe to say that a state has the right to extend its territorial waters from time to time at its will with the increased range of guns; though it would undoubtedly be more satisfactory that an arrangement upon the subject should be come to by common agreement<sup>1</sup>.

It seems to be generally thought that straits are subject to the same rule as the open sea; so that when they are more than six miles wide the space in the centre which lies outside the limit of a marine league is free, and that when they are less than six miles wide they are wholly within the territory of the state or states to which their shores belong. This doctrine however is scarcely consistent with the view, which is also generally taken, that gulfs, of a greater or less size in the opinion of different writers, when running into

<sup>2</sup> Straits, gulfs, and bays.

<sup>1</sup> Bluntchli (§ 302) thinks that, considering the range of modern artillery, the three-mile zone is too narrow. Fiore also (i. 373) expresses the opinion that '*la zone de juridiction pourrait s'étendre à proportion des perfectionnements des moyens d'artillerie.*'

It appears to have been suggested by the American government to that of England in 1864 that territorial waters should be considered to extend to a distance of five miles from shore.

PART II. the territory of a single state, can be included within its  
 CHAP. II. territorial waters; perhaps also it is not in harmony with the actual practice with respect to waters of the latter kind. France appears to claim inlets or recesses the entrance of which is not more than ten miles wide<sup>1</sup>. England would, no doubt, not attempt any longer to assert a right of property over the Queen's Chambers, which include the waters within lines drawn from headland to headland, as from Orfordness to the Foreland and from Beachey Head to Dunnose Point; but some writers seem to admit that they belong to her, and a recent decision of the Privy Council has affirmed her jurisdiction over the Bay of Conception in Newfoundland, which penetrates forty miles into the land and is fifteen miles in mean breadth. Authors also so little favourable to maritime property as Ortolan and De Cussy class the Zuyder Zee amongst appropriated waters. The United States probably regard as territorial the Chesapeake and Delaware Bays and other inlets of the same kind<sup>2</sup>. In principle it is difficult to separate gulfs and straits from one another; the reason which is given for conceding a larger right of appropriation in the case of the former than of the latter, viz. that all nations are interested in the freedom of straits, being meaningless unless it be granted that a state can prohibit the innocent navigation of such of its territorial waters as vessels may pass over in going from one foreign place to another. If that could be done, it might be necessary to impose a special restriction upon the

<sup>1</sup> This at least was the general reservation made by the Fishery Treaty of 1839 with England (De Martens, *Nouv. Rec.* xvi. 954); but the whole of the oyster-beds in the Bay of Cancale, the entrance of which is seventeen miles wide, were regarded as French, and the enjoyment of them is reserved to the local fishermen.

<sup>2</sup> Klüber, § 130; De Martens, *Précis*, § 42; Wheaton, *Elem.* pt. ii. ch. iv. § 7, 9; Heffter, § 76; Ortolan, *Dip. de la Mer*, liv. ii. ch. viii; Phillimore, i. § clxxxviii, cxcix; Halleck, i. 140; Bluntschli, § 309; *Direct United States Cable Company Limited v. Anglo-American Telegraph Company Limited*, 1877, ii App. Cases, 394.

Whether the government of the United States would or would not now claim Delaware Bay, it at least did so in 1793, when the English ship *Grange*, captured in it by a French vessel, was restored on the ground of the territoriality of its waters. *Am. State Papers*, i. 73.

appropriation of waters which by their position are likely to be so used. Such however not being the case in fact, it is the power of control which has alone to be looked to; and the power of exercising control is not less when water of a given breadth is terminated at both ends by water than when it merely runs into the land. Of practice there is a curious deficiency, and there is nothing to show how many of the claims to gulfs and bays which still find their place in the books are more than nominally alive. It is scarcely possible to say anything more definite than that, while on the one hand it may be doubted whether any state would now seriously assert a right of property over broad straits or gulfs of considerable size and wide entrance, there is on the other hand nothing in the conditions of valid maritime occupation to prevent the establishment of a claim either to basins of considerable area, if approached by narrow entrances such as those of the Zuyder Zee, or to large gulfs which, in proportion to the width of their mouth, run deeply into the land, even when so large as the Bay of Fundy, or still more to small bays, such as that of Cancale.

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§ 42. In all cases in which territorial waters are so placed that passage over them is either necessary or convenient to the navigation of open seas, as in that of marginal waters, or of an appropriated strait connecting unappropriated waters, they are subject to a right of innocent use by all mankind for the purposes of commercial navigation<sup>1</sup>. The general consent of nations, which was seen to be wanting to the alleged right of navigation of rivers, may fairly be said to have been given to that of the sea. Even the earlier and more uncompromising advocates of the right of appropriation reserved a general right of innocent navigation; for more than two hundred and fifty years no European territorial marine waters which could be used as a thoroughfare, or into which vessels could accidentally

Right of  
foreign  
states to  
the inno-  
cent use of  
the terri-  
torial seas  
of a state.

<sup>1</sup> The case of gulfs or other inlets would seem to be upon a different footing, except in so far as they are used for purposes of refuge. Any right to their navigation must be founded on a right of access to the state itself.

PART II. stray or be driven, have been closed to commercial navigation ;  
CHAP. II. and during the present century no such waters have been closed  
— in any part of the civilised world. The right therefore must  
be considered to be established in the most complete manner <sup>1</sup>.

This right of innocent passage does not extend to vessels of war. Its possession by them could not be explained upon the grounds by which commercial passage is justified. The interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by the vessels of all states. But no general interests are necessarily or commonly involved in the possession by a state of a right to navigate the waters of other states with its ships of war. Such a privilege is to the advantage only of the individual state; it may often be injurious to third states; and it may sometimes be dangerous to the proprietor of the waters used. A state has therefore always the right to refuse access to its territorial waters to the armed vessels of other states, if it wishes to do so.

<sup>1</sup> Klüber (§ 76) is probably the only writer who denies the existence of the right. He says, '*on ne pourrait accuser un état d'injustice s'il défendait . . . le passage des vaisseaux sur mer sous le canon de ses côtes.*'

## CHAPTER III.

### NON-TERRITORIAL PROPERTY OF A STATE.

§ 43. A STATE may own property as a private individual PART II. CHAP. III.  
within the jurisdiction of another state; it may possess the immediate as well as the ultimate property in moveables, land, In what non-territorial property of the state consists.  
and buildings within its own territory; and it may hold property in its state capacity in places not belonging to its own territory, whether within or outside the jurisdiction of other states. With property held in the first of these ways international law has evidently nothing to do; that, on the other hand, which is held in the two latter ways falls within its scope; but the usages affecting property of which the immediate as well as the ultimate ownership is in the state, and which is within its own territory, are entirely included in the laws of war<sup>1</sup>; it is therefore only the last-mentioned kind of property which requires to be mentioned here, and this consists in—

1. Public vessels of the state.
2. Private vessels covered by the national flag.
3. Goods owned by subjects of the state, but embarked in foreign ships.

§ 44. Public vessels of the state consist in ships of war, in Public vessels of the state.  
government ships not armed as vessels of war, such as royal or admiralty yachts, transports, or store ships, and in vessels temporarily employed, whether as transports or otherwise, provided that they are used for public purposes only, that they

<sup>1</sup> See Pt. iii. ch. iii.



PART II.  
CHAP. III.  
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are commanded by an officer holding such a commission as will suffice to render the ship a public vessel by the law of his state, and that they satisfy any other conditions which may be required by that law<sup>1</sup>. The character of a vessel professing to be public is usually evidenced by the flag and pendant which she carries, and if necessary by firing a gun. When in the absence of, or notwithstanding, these proofs any doubt is entertained as to the legitimacy of her claim, the statement of the commander on his word of honour that the vessel is public is often accepted, but the admission of such statement as proof is a matter of courtesy. The commission under which the commander acts, on the other hand, must necessarily be received as conclusive, it being a direct attestation of the character of the vessel made by the competent authority within the state itself<sup>2</sup>.

Private  
vessels  
covered by  
the na-  
tional flag.

§ 45. Private vessels belonging to a state are those which, belonging to private owners, satisfy such conditions of nationality as may be imposed by the state laws with reference to ownership, to place of construction, the nationality of the captain, or the composition of the crew<sup>3</sup>. In common with vessels of war the flag is the apparent sign of the nationality of the ship, but as a merchant vessel is not in the same close relation to the state as a public vessel, and its commander, unlike the commander of the latter, is not an agent of the state, recourse is not had to his affirmation in proof of its character, which must be shown by papers giving full information as to its identity and as to its right to carry the flag

<sup>1</sup> Ortolan, *Dip. de la Mer*, i. 181-6.

<sup>2</sup> *The Santissima Trinidad*, vii Wheaton, 335-7; Ortolan, *Dip. de la Mer*, i. 181; Phillimore, i. § cccxlviii.

The admission of the word of the commander is sometimes regarded as obligatory. When the *Sumter* was allowed to enter the port of Curaçao, the Dutch government answered the complaints of the United States by pointing out that the commander had declared the vessel to be commissioned, adding that '*le gouverneur néerlandais devait se contenter de la parole du commandant, couchée par écrit.*' Ortolan, *Dip. de la Mer*, i. 183.

<sup>3</sup> See Appendix ii.

displayed by it, or, in other words, as to whether it has con- PART II.  
formed to the laws of its state <sup>1</sup>. CHAP. III.

§ 46. The conditions under which goods owned by subjects Goods  
of a state, but embarked in foreign ships, are part of the owned by  
property of the state are merely, that the owners must not subjects of  
have acquired a foreign character by domicile or service in the state,  
another country. It will be seen later that it is possible but em-  
for a person, without ceasing to be a subject of his state barked in  
of origin, to be so intimately associated with a foreign state foreign  
that the national character of property belonging to him may ships.  
be affected by such association. It is for the competent  
courts to determine by what evidence the necessary facts must  
be proved, if disputed.

<sup>1</sup> See Appendix iii.

## CHAPTER IV.

### SOVEREIGNTY IN RELATION TO THE TERRITORY OF THE STATE.

PART II.  
CHAP. IV.

—  
Enumera-  
tion of the  
points re-  
quiring  
notice.

§ 47. It has been seen that a state possesses jurisdiction within certain limits, in virtue of its territorial sovereignty, over the person and property of foreigners found upon its land and waters, and that it is responsible, also within certain limits, for acts done within its boundaries by which foreign states or their subjects are affected<sup>1</sup>. The broad statement of the rights which a state possesses, and of the duties by which it is affected, in these respects in a time of general peace, which has already been made, sufficiently indicates the law upon most points connected with them; but there are some special rules, and practices claiming to be legal, which have not been touched upon, and there are others of which the applications require to be examined in detail. These may be referred to the following heads:—

1. Exceptions, real or alleged, to the general right of exercising jurisdiction over foreign persons and property.

2. Extent of the right of a state to require aid from foreigners within its territory in maintaining the public safety or social order.

3. An alleged right to take cognizance of acts done by foreigners beyond the limits of a state if the persons who have done them subsequently enter its territorial jurisdiction.

4. The right of asylum and of adopting a foreigner into the state community.

5. Responsibility of a state.

<sup>1</sup> See § 10, 11.

§ 48. It is universally agreed that sovereigns and the armies of a state, when in foreign territory, and that diplomatic agents, when within the country to which they are accredited, possess immunities from local jurisdiction in respect of their persons, and in the case of sovereigns and diplomatic agents with respect to their retinue, that these immunities generally carry with them local effects within the dwelling or place occupied by the individuals enjoying them, and that public ships of the state confer some measure of immunity upon persons on board of them. The relation created by these immunities is usually indicated by the metaphorical term *extritoriality*, the persons and things in enjoyment of them being regarded as detached portions of the state to which they belong, moving about on the surface of foreign territory and remaining separate from it. The term is picturesque; it brings vividly before the mind one aspect at least of the relation in which an exempted person or thing stands to a foreign state; but it may be doubted whether its picturesqueness has not enabled it to seize too strongly upon the imagination. *Extritoriality* has been transformed from a metaphor into a legal fact. Persons and things which are more or less exempted from local jurisdiction are said to be in law outside the state in which they are. In this form there is evidently a danger lest the significance of the conception should be exaggerated. If *extritoriality* is taken, not merely as a rough way of describing the effect of certain immunities, but as a principle of law, it becomes, or at any rate it is ready to become, an independent source of legal rule, displacing the principle of the exclusiveness of territorial sovereignty within the range of its possible operation in all cases in which practice is unsettled or contested. This of course is conceivably its actual position. But the exclusiveness of territorial sovereignty is so important to international law and lies so near its root, that no doctrine which rests upon a mere fiction can be lightly assumed to have been accepted as controlling it. In examining the immunities in question, therefore, it will be best to put

PART II.

CHAP. IV.

Doctrines of  
extritoriality.

PART II. aside for the present the idea of extritoriality, and to view  
 CHAP. IV. them solely by the light of the reasons for which they have  
 — been conceded, and of the usage which has prevailed with  
 respect to them.

Origin of  
 the immu-  
 nities  
 usually  
 classed  
 under the  
 head of  
 extrito-  
 riality.

The immunities which have been conceded to the persons and things above mentioned are prompted by considerations partly of courtesy and partly of convenience so great as to be almost equivalent to necessity. The head of the state, its armed forces, and its diplomatic agents are regarded as embodying or representing its sovereignty, or in other words, its character of an equal and independent being. They symbolise something to which deference and respect are due, and they are consequently treated with deference and respect themselves. Supposing reasons of courtesy to be disregarded, immunities would still be required upon the ground of practical necessity. If a sovereign, while in a foreign state, were subjected to its jurisdiction, the interests of his own state might readily be jeopardised by the consequences of his position. In like manner the armed forces of a country must be at the disposal of that country alone. They must not be liable either to be so locked up as to be incapable of being used at will, or to be so affected by foreign interference as to lose their efficiency; and submission to local jurisdiction would open the door sometimes to loss of freedom, and sometimes to a supersession of the authority of the officer in command. Finally, it is for the interest of the state accrediting a diplomatic agent, and in the long run in the interest also of the state to which he is accredited, that he shall have such liberty as will enable him, at all times and under all circumstances, to conduct the business with which he is charged; and liberty to this extent is incompatible with full subjection to the jurisdiction of the country with the government of which he negotiates. The first of these sets of considerations was perhaps that which formerly had the greater influence. When states were identified with their sovereigns, and the relations of states were in great measure personal relations

of individuals, considerations of courtesy were naturally prominent; and to them must still be referred such established immunities as are not necessary to the free exercise of the functions of the exempted person or thing. Those immunities, on the other hand, which may claim to exist on the score of necessary convenience, though in many cases they may have in fact owed their birth to courtesy, can now be more properly referred to convenience, both because it is a less artificial origin, and because it corresponds better with the present temper of states, and so with the reasons by which they would be likely to be guided in making any modifications of actual custom, or in defining unsettled practice.

§ 49. A sovereign, while within foreign territory, possesses immunity from all local jurisdiction in so far and for so long as he is there in his capacity of a sovereign. He cannot be proceeded against either in ordinary or extraordinary civil or criminal tribunals, he is exempted from payment of all dues and taxes, he is not subjected to police or other administrative regulations, his house cannot be entered by the authorities of the state, and the members of his suite enjoy the same personal immunity as himself. If he commits acts against the safety or the good order of the community, or permits them to be done by his attendants, the state can only expel him from its territory, putting him under such restraint as is necessary for the purpose. In doing this it uses means for its protection analogous to those which one state sometimes employs against another, when it commits acts of violence for reasons of self-preservation without intending to go to war. The privileges of a sovereign consequently secure his freedom from all assertion of sovereignty over him or over anything or anybody attached to him in his sovereign capacity. On the other hand, he cannot set up an active exercise of his functions as a sovereign in derogation of the exclusive territorial rights of the state in which he is. If a crime is committed by a member of his suite, the accused person cannot be tried and punished within the precincts occupied by him; neither he nor his judges are

PART II. able to take cognizance of an action brought by a foreigner  
 CHAP. IV. against persons in attendance on him, and if there is nothing  
 — to prevent judgment being given in questions arising between  
 the latter alone, the decision cannot at any rate be enforced. Criminals belonging to his suite must be sent home to be tried, and civil causes, whether between them or between subjects of other powers and them, must equally be reserved for the courts sitting within his actual territory. Again, a sovereign cannot protect in his house an accused person, not a member of his suite, who takes refuge from the pursuit of the local authorities. They cannot enter; but he is bound to surrender the refugee; and a refusal to give him up would justify the authorities in expelling the sovereign and in preventing the accused person by force from being carried off in his retinue<sup>1</sup>.

Position of  
 a sovereign  
 who

1. assumes  
 the cha-  
 racter of a  
 private in-  
 dividual  
 for certain  
 purposes;

Where, as occasionally happens, a sovereign has a double personality, where, that is to say, he for some purposes assumes the position of a private individual, or where, while remaining sovereign in his own country, he is a subject elsewhere, he is amenable to foreign jurisdiction in so far as he is clothed with a private or subject character. Thus if he enters the military service of a foreign country he submits to its sovereignty in his capacity of a military officer, and if he travels incognito he is treated as the private individual whom

<sup>1</sup> Bynkershoek, *De Foro Legatorum*, c. iii; Bluntschli, § 129, 136-42, 150-3; Phillimore, ii. § civ-viii; Heffter, § 42 and 53-4; Calvo, § 506-8; Foelix, *Droit Int. Privé*, liv. ii. tit. ii. c. ii. sect. 4 (ed. 1847); Klüber, § 49; De Martens, *Précis*, § 172. Phillimore and Klüber consider that a sovereign within foreign territory has civil jurisdiction over his suite, and De Martens seems to concede to him both civil and criminal jurisdiction.

The immunity of a sovereign as the representative of his state for anything done or omitted to be done by him in his public capacity has been affirmed by the English courts in *De Haber v. the Queen of Portugal* (xx Law Journal, Q. B. 488), and the French courts gave effect to the same principle in the case of an action brought by a M. Solon against the Viceroy of Egypt.

If a sovereign appeals to the courts of a foreign state or accepts their jurisdiction 'he brings with him no privileges that can displace the practice as applying to other suitors.' *The King of Spain v. Hullet and Widder*, i Clark and Finelly, H. of L. 333; Calvo, § 513.

he appears to be; as however in such cases he is only accidentally or temporarily a private person, and as he properly remains the organ of his country, he has the right of taking up his public position whenever the exercise of jurisdiction over him becomes inconsistent in his view with the interests of his state. He recovers the privileges of a sovereign at will by resigning his commission or declaring his identity.

Whether his power of throwing off foreign jurisdiction is equally great when he is a subject, and as such is invested with permanent privileges, which the state cannot refuse to accord to him, may perhaps be open to question. If, for example, as occurred in the case of the Duke of Cumberland after his accession to the throne of Hanover, a foreign sovereign takes an oath of allegiance in England, and sits as an English peer by hereditary title, he may do acts in the exercise of his rights which lay him open to impeachment; and it would be at least anomalous and inconvenient that he should be able, whenever he may choose, to take up or lay down his privileges and responsibilities, and to protect himself at will against the consequences of the latter by putting on a mantle of inviolability.

When a sovereign holds property in a foreign country, which clearly belongs to him as a private individual, the courts of the state may take cognizance of all questions relating to the property, and the property itself is affected by the result of the proceedings taken in them<sup>1</sup>.

§ 50. The immunities of diplomatic agents are in outline

<sup>1</sup> Bynkershoek, *De Foro Legatorum*, c. xvi; De Martens, *Précis*, § 172-3; Klüber, § 49; Heffter, § 53-4; Phillimore, ii. § cviii-ix; Bluntachli, § 131-4, 140; Calvo, § 513.

It is considered by many writers that real property held by a sovereign in a foreign country as a private individual is alone subject to the local jurisdiction, and that personal property is exempt. The distinction appears also to be sometimes made in practice. It is however irrational in itself, and it is difficult to see, in view of the complex relations which in the present day grow out of the possession of personalty, how it would be possible to maintain the exemption. It would be less inconvenient to relieve real property for certain purposes from the local laws than to allow personal property to escape their operation.



PART II. the same as those of sovereigns. But the comparative short-  
 CHAP. IV. ness and rarity of the visits of the latter to foreign countries,  
 — and still more the circumstances under which they usually  
 take place, have caused the law affecting the heads of states to  
 remain a general doctrine, which there has been little, if any,  
 opportunity of applying contentiously. With regard to diplo-  
 matic agents, on the other hand, it has become gradually  
 settled through application in a large number of instances,  
 in which questions have arisen. In the course of this settle-  
 ment some of the immunities of ambassadors have perhaps  
 been pared down below the point which would have been fixed  
 for the privileges of sovereigns had like cases brought them  
 into question.

Immu-  
 nities of  
 diplomatic  
 agents :

1. from  
 the crimi-  
 nal juris-  
 diction of  
 the state ;

A diplomatic agent cannot be tried for a criminal offence by the courts of the state to which he is accredited, and cannot as a rule be arrested. It is nevertheless a nice question whether he can be said to be wholly free from the local jurisdiction in respect of criminal acts done by him. If he commits a crime, whether against individuals or the state, application must ordinarily be made to the state which he represents to recall him, or if the case is serious he may be ordered to leave the country at once, without communication being previously made to his government. But if the alleged act is one of extreme gravity, he can be arrested and kept in custody while application for redress is being made, and can even be retained for other purposes than that of restraining his freedom of action pending the result of the application<sup>1</sup>. In 1717, for instance, Count Gyllenborg, the Swedish ambassador to England, was arrested for complicity in a plot against the Hanoverian dynasty, and instead of being immediately sent out of the kingdom, was kept for a time, of which part may be accounted for by the retention of the English minister in Sweden, but of which part must have elapsed before the action of the Swedish government was known. In 1718 the

<sup>1</sup> Vattel, liv. iv. ch. vii. § 94-5 ; Klüber, § 211 ; Wheaton, Elem. pt. iii. ch. i. § 15 ; Heffter, § 42 ; Phillimore, ii. § cliv-viii ; Bluntschli, § 209-10.

Prince of Cellamare, the Spanish ambassador in Paris, having organised a conspiracy against the government of the Duke of Orleans, was arrested and retained in custody until news came of the safe arrival in France of the French ambassador at Madrid. No protest was made by the resident ambassadors from other courts in the latter case, and though dissatisfaction at the arrest of Count Gyllenborg was at first felt by some of the ministers accredited to England, the expression which had been given to it was withdrawn when the facts justifying the arrest were made known<sup>1</sup>. Arrests of this kind may be regarded, either, upon the analogy already applied in the case of sovereigns, as acts of violence done in self-defence against the state the representative of which is subjected to them, or as acts done in pursuance of a right of exercising jurisdiction upon sufficient emergency, which has not been abandoned in conceding immunities to diplomatic agents. The former mode of accounting for them seems forced, because though a diplomatic agent is representative of his state, he is not so identified with it that his acts are necessarily its acts, because in such cases as those cited the ambassador of a friendly power must *primâ facie* be supposed to be exceeding his instructions in doing acts inimical to the government to which he is accredited, and finally because such acts as those done in the instances mentioned, in going beyond the point of an arrest followed by immediate expulsion from the country, exceed what in strict necessity is required for self-protection. It appears to be the more reasonable course therefore to adopt the latter of the two modes of explaining them.

The immunities from civil jurisdiction possessed by a diplomatic agent, though up to a certain point they are open to no question, are not altogether ascertained with thorough clearness. The local jurisdiction cannot be exercised in such manner as to interfere however remotely with the freedom of

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2. from  
the civil  
jurisdiction  
of the  
state.

<sup>1</sup> De Martens, *Causes Célèbres*, i. 101 and 149. He omits to notice that the complaints made with respect to the case of Count Gyllenborg by the ministers accredited to England were afterwards withdrawn.

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diplomatic action, or with the property belonging to a diplomatic agent as representative of his sovereign ; a diplomatic agent cannot therefore be arrested, and the contents of his house, his carriages, and like property necessary to his official position, cannot be seized. For some purposes also he is distinctly conceived of as being not so much privileged as outside the jurisdiction. Thus children born to him within the state to which he is accredited are not its subjects, notwithstanding that all persons born of foreigners within its territories may be declared by its laws to be so. On the other hand, the jurisdiction of the state extends over real property held by him as a private individual, and he is subject to such administrative and police regulations as are necessary for the health or the safety of the community.

Difference  
of opinion  
as to its  
extent,

Beyond these limits there is considerable difference of opinion. Some writers consider that, except for the purposes of the regulations mentioned and in respect of his real property, his consent is required for the exercise of all local jurisdiction, and that consequently it can only assert itself in so far as he is willing to conform to its rules in non-contentious matters, or when he has chosen to plead to an action, or to bring one himself. In cases of the latter kind he consents to the effects of an action in so far as they do not interfere with his personal liberty or with the property exempted in virtue of his office ; he makes his property liable, for example, to payment of costs and damages, and when he himself takes proceedings he obliges himself to plead to a cross action. In other matters, according to this view, he is subject to the laws of his own state, and satisfaction of claims upon him, of whatever kind they may be, can only be obtained, either by application to his sovereign through the government to which he is accredited, or by having recourse to the courts of his country<sup>1</sup>. Other authorities hold that in matters un-

<sup>1</sup> Vattel, liv. iv. ch. viii. § 110-6 ; Foelix, liv. ii. tit. ii. ch. ii. sect. iv ; Twiss, i. 305 ; Riquelme, i. 482 ; Halleck, i. 280, 284-6. Vattel, with whom Wheaton (pt. iii. ch. i. § 17) seems to agree, admits that if a diplomatic

connected with his official position he is liable to suits of every kind brought in the courts of the country where he is resident, that the effects of such suits are only limited by the undisputed immunities above mentioned, and that consequently all property within the jurisdiction, other than that necessary to his official position, is subjected to the operation of the local laws. Thus he is exposed, for example, to actions for damages or breach of contract; if he engages in mercantile ventures, whether as a partner in a firm or as a shareholder in a company, his property is liable to seizure and condemnation at the suit of his creditors; if he acts as executor he must plead to suits brought against him in that capacity<sup>1</sup>.

agent engages in commerce, his property so employed is subject to the local jurisdiction, but to the extent only, it would appear, of the merchandise, cash, debts due to him, and other assets, if any, representing the capital actually used by him in the business. Heffter (§ 42) considers that exemption from jurisdiction, except by consent, though usual, is not obligatory.

It has been questioned whether the local courts become authorised to exercise jurisdiction by the mere renunciation of privilege by a diplomatic agent, or whether his renunciation is invalid unless it has been made with the consent of his government. In the United States it appears to have been decided that the permission of his government is necessary. It is however difficult to see why the courts should go out of their way to require that a condition shall be satisfied which is of importance only as between the diplomatic agent and his own state, and the fulfilment of which they have no means of ascertaining except through the agent himself. Nor is it easy to see what right they have to ask for any assurance beyond the profession of sufficient authority which is implied by the minister when he submits or appeals to them.

<sup>1</sup> De Martens, Précis, § 216-7; Klüber, § 210; Woolsey, § 92, b; Calvo, § 527. See also Bynk. De Foro Legatorum, c. xvi.

Bluntschli (§ 139-40 and 218) admits the competence of the civil tribunals in all cases in which an action could have been brought, supposing the diplomatic agent to be in fact in his own country, and in so far as he occupies in the foreign state 'une position spéciale, en qualité de simple particulier (négociant par exemple).' This view, which accommodates the competence of the tribunals to the fiction of extritoriality, excludes the local jurisdiction in several directions with respect to which it is recognised under the above doctrine; but it may be assumed that the whole of the private property of the diplomatic agent is contemplated as being subject to the jurisdiction for the purpose of those cases of which cognizance can be taken.

The precise effect of the language of the authors cited in this and the foregoing note is in some cases very difficult to seize. The extremes of opinion are easily distinguished; but many writers are either doubtful, or fail to express themselves clearly.

PART II. Of these two opinions the former is that which is the more in  
 CHAP. IV. agreement with practice. In England it is declared by statute  
 Practice. that 'all writs and processes whereby the goods or chattels' of  
 a diplomatic agent 'may be distrained, seized or attached  
 shall be deemed and adjudged to be utterly null and void to  
 all intents, constructions and purposes whatsoever<sup>1</sup>.' The law  
 of the United States is similar. In France, during the last  
 century, it was held that the only object of the immunity of  
 an ambassador was to prevent him from being embarrassed in  
 the exercise of his functions, and that, as his property can be  
 seized or otherwise dealt with without preventing him from  
 fulfilling his public duties, whatever he possesses in the  
 country to which he is accredited is subjected to the local  
 jurisdiction. From a wish however to avoid as much as  
 possible any act derogating from the courtesy due to the  
 ambassador as representative of his state, it was considered  
 best to exert the territorial jurisdiction by means less openly  
 offensive than that of allowing suits against him to be thrown  
 into the courts. Accordingly when Baron von Wrech, minister  
 of Hesse Cassel, endeavoured to leave France without paying  
 his debts, his passport was refused until his creditors were  
 satisfied. In the present century a change of view appears to  
 have taken place, and the exemption of a diplomatic agent  
 from the control of the ordinary tribunals is treated rather as  
 a matter of right than of courtesy. An article expressly con-  
 ceding immunity was inserted in the original project of the  
 civil code, and though it was expunged on the ground that it  
 had no place in a code of municipal law, the courts have

<sup>1</sup> 7 Anne, c. 12. The decisions upon this statute have been carried to the point of determining that the public minister of a foreign state accredited to England may not be sued against his will in the courts of that country, neither his person nor his goods being touched by the suit, while he remains such public minister. The decision was given with express reference to the contention of counsel that 'the action could be prosecuted to the stage of judgment, with a view to ascertain the amount of the debt, and to enable the plaintiffs to have execution on the judgment when the defendant may cease to be a public minister.' *Magdalena Steam Navigation Company v. Martin*, ii Ellis and Ellis, 111.

always treated it as giving expression to international law, and have acted in conformity with it. In Austria the civil code merely declares that diplomatic agents enjoy the immunities established by international law. In Germany the code in like manner provides that an ambassador or resident of a foreign power shall retain his immunities in conformity with international law; and the space which they are understood to cover may perhaps be inferred from the language used in 1844 by Baron von Bülow, who in writing to Mr. Wheaton with reference to a question then at issue between the governments of Prussia and the United States, said that 'the state cannot exercise against a diplomatic agent any act of jurisdiction whatever, and as a natural consequence of this principle, the tribunals of the country have, in general, no right to take cognizance of controversies in which foreign ministers are concerned.' But for the use of the words 'in general' this statement of the views then entertained by the Prussian government would be perfectly clear, and considering the breadth with which the incapacity of a state to exercise jurisdiction is laid down, it seems reasonable to look upon them only as intended to except cases in which a diplomatic agent voluntarily appeals to the courts. In Spain the curious regulation exists that an ambassador is exempt from being sued in respect of debts contracted before the commencement of his mission, but that he is liable in respect of those incurred during its continuance. In Portugal the same distinction is made, but in a converse sense, an ambassador being exposed to proceedings in the courts in respect of such debts only as he has incurred antecedently to his mission. In Russia the ministry of foreign affairs is the sole medium for reclamations against a diplomatic agent<sup>1</sup>.

Custom is thus apparently nearly all one way; but the accepted practice is an arbitrary one, conceding immunities which are not necessary to the due fulfilment of the duties of

<sup>1</sup> *Fœlix*, liv. ii. tit. ii. ch. ii. sect. iv; *Phillimore*, ii. § cxciv-ix; *De Martens*, *Causes Cél.* ii. 282; *Wheaton*, *Elem.* pt. iii. ch. i. § 17; *Riquelme*, i. 491.

PART II. a diplomatic agent ; and in a few countries it is either not  
 CHAP. IV. fully complied with or there may at least be some little doubt  
 whether it would certainly be followed in all cases or not. The views expressed by so competent an authority as M. Bluntschli suggest that courts, at least in Germany, might take cognizance of a considerable number of cases affecting a diplomatic agent by looking upon his private personality as separable from his diplomatic character.

Immunities of the family and suite of a diplomatic agent.

§ 51. The immunities of a diplomatic agent are extended to his family living with him, because of their relationship to him, to secretaries and attachés forming part of the mission but not personally accredited, because of their necessity to him in his official relations, and perhaps also to domestics and other persons in his service not possessing a diplomatic character, because of their necessity to his dignity or comfort. These classes of persons have thus no independent immunity. That which they have, they claim, not as sharing in the representation of their state, nor as being necessary for its service, but solely through, and because of, the diplomatic agent himself. Hence in practice the immunity of servants and of other persons whose connection with the minister is comparatively remote, is very incomplete ; and it may even be questioned if they possess it at all in strict right, except with regard to matters occurring between them and other members or servants of the mission. It is no doubt generally held that they cannot be arrested on a criminal charge and that a civil suit cannot be brought against them, without the leave of their master, and that it rests in his discretion whether he will allow them to be dealt with by the local authorities, or whether he will reserve the case or action for trial in his own country. But in England, at any rate, this extent of immunity is not recognised. Under the statute of Anne, the privilege of exemption from being sued, possessed by the servant of an ambassador, is lost by 'the circumstance of trading ;' and when the coachman of Mr. Gallatin, the United States minister in London, committed an assault outside the house occupied by



the mission the local authorities claimed to exercise jurisdiction in the case<sup>1</sup>. The English practice is exceptional; but it is not unreasonable. The inconvenience would be great of withdrawing cases or causes from the tribunals of the country in which the facts giving rise to them have occurred; and at the same time it cannot be seriously contended that either the convenience or the dignity of a minister is so affected by the exercise of jurisdiction over non-diplomatic members of the suite, and it might perhaps even be said, over non-accredited members of the mission, as to render exemption from it, except when such exemption is permitted by the diplomatic agent, an imperative necessity. Happily there is little difference in effect between the received and the exceptional doctrine. No minister wishes to shield a criminal, and there is no reason to believe that permission to exercise jurisdiction is refused upon sufficient cause being shown.

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In order that a person in non-diplomatic employment shall be exempt from the direct action of the territorial jurisdiction it is always necessary that he shall be engaged permanently and as his regular business in the service of the minister. Residence in the house of the latter, on the other hand, is not required. Questions consequently may arise as to whether a particular person is or is not in his service in the sense intended; they have even sometimes arisen as to whether a person has been colourably admitted into it for the sake of giving him protection. With the view of

<sup>1</sup> In 1790 it was attempted at Munich to make a distinction between the members of a mission and the persons in attendance on them, and to assert local jurisdiction over the latter as of right. De Martens (*Précis*, 219, n., and *Causes Cél.* iv. 20) thought the distinction inadmissible, and it seems not to have been consistent with usage.

Vattel, liv. iv. ch. ix. § 121-4; De Martens, *Précis*, § 219; Klüber, § 212-3; Wheaton, *Elem.* pt. iii. ch. i. § 16, and Dana's note, No. 129; Halleck, i. 291; Bluntschli, § 211-15; Calvo, § 536.

It was formerly customary for ambassadors to exercise criminal jurisdiction over their suite, and there have been cases, as for example that of a servant of the Duc de Sully, French ambassador in England in 1603, in which capital punishment has been inflicted. But it is now universally recognised that a diplomatic agent, of whatever rank, has no such power.



PART II. obviating such disputes it is the usage to furnish the local  
 CHAP. IV. authorities with a list of the persons for whom immunity  
 is claimed, and to acquaint them with the changes which may  
 be made in it as they occur.

Immu-  
 nities of  
 the house  
 of a diplo-  
 matic  
 agent.

§ 52. It is agreed that the house of a diplomatic agent is so far exempted from the operation of the territorial jurisdiction as is necessary to secure the free exercise of his functions. It is equally agreed that this immunity ceases to hold in those cases in which a government is justified in arresting an ambassador and in searching his papers;—an immunity which exists for the purpose of securing the enjoyment of a privilege comes naturally to an end when a right of disregarding the privilege has arisen. Whether, except in this extreme case, the possibility of embarrassment to the minister is so jealously guarded against as to deprive the local authorities of all right of entry irrespectively of his leave, or whether a right of entry exists whenever the occasion of it is so remote from diplomatic interests as to render it unlikely that they will be endangered, can hardly be looked upon as settled. Most writers regard the permission of the minister as being always required; and Vattel refers to a case which occurred in Russia where two servants of the Swedish ambassador having been arrested in his house for contravening a local law, the Empress felt obliged to atone for the affront by punishing the person who had ordered the arrest, and by addressing an apologetic circular to the members of the diplomatic body<sup>1</sup>. In England however, in the case of Mr. Gallatin's coachman, the government claimed the right of arresting him within the house of the minister, admitting only that as a matter of courtesy notice should be given of the intention to arrest, so that either the culprit might be handed over or that arrangements might be made for his seizure at a time convenient to the minister. In France it has been held by the courts that the privileges of an ambassador's house do not cover acts

<sup>1</sup> Vattel, liv. iv. ch. ix. § 117; Klüber, § 207; Phillimore, ii. § cciv; Bluntschli, § 150.

affecting the inhabitants of the country to which he is accredited; and when in 1867, a Russian subject, not in the employment of the ambassador, attacked and wounded an attaché within the walls of the embassy, the French government refused to surrender the criminal, as much upon the general ground that the fiction of extritoriality could not be stretched to embrace his case, as upon the more special one, which was also taken up, that by calling in the assistance of the police the immunities of the house had been waived, if any in fact existed in the particular instance<sup>1</sup>. It does not appear whether the French government, in denying that the fiction of extritoriality applied to the case in question, intended to imply the assertion of a right to do all acts necessary to give effect to its jurisdiction, and whether consequently it claimed that it would have had a right to enter the ambassador's house to arrest the criminal, or whether it merely meant that, if the criminal had been kept within the embassy and the ambassador had refused to give him up, a violation of the local jurisdiction would have taken place for which the appropriate remedy would have been a demand addressed to the Russian government to recall their ambassador and to surrender the accused person. Whether or not however the immunities of the house of a diplomatic agent protect it in all cases from entry by the local authorities, and if so whatever may be the most appropriate means for enforcing jurisdiction, it is difficult to resist the belief that there are cases in which the territorial jurisdiction cannot be excluded by the immunities of the house. If an assault is committed within an embassy by one of two workmen upon the other, both being in casual employment, and both being subjects of the state to which the mission is accredited, it would be little less than absurd to allow the consequences of a fiction to be pushed so

<sup>1</sup> Dana, note to Wheaton, No. 129; Calvo, § 521. The latter writer is opposed to so large an assertion of the privileges of an ambassador's house as is found in most books. His opinion, as he was himself for some time minister at Paris, is peculiarly valuable on the point.

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far as to render it even theoretically possible that the culprit, with the witnesses for and against him, should be sent before the courts in another country for a trivial matter in which the interests of that country are not even distantly touched.

In one class of cases the territorial jurisdiction has asserted itself clearly by a special usage. If the house of a diplomatic agent were really in a legal sense outside the territory of the state in which it is placed, a subject of that state committing a crime within the state territory and taking refuge in the minister's residence could only be claimed as of right by the authorities of his country if the surrender of persons accused of the crime laid to his charge were stipulated for in an extradition treaty. In Europe however it has been completely established that the house of a diplomatic agent gives no protection either to ordinary criminals, or to persons accused of crimes against the state<sup>1</sup>. A minister must refuse to harbour applicants for refuge, or if he allows them to enter he must give them up on demand. In Central and Southern America matters are different. It is an instance of how large a margin of indefiniteness runs along the border of diplomatic privilege that the custom of granting asylum to political refugees in the houses of diplomatic and even of consular agents still probably exists in the Spanish-American Republics. It at least lasted there till so recently that in 1870 the govern-

<sup>1</sup> Vattel, liv. iv. ch. ix. § 118; De Martens, Précis, § 220; Klüber, § 208; Phillimore, ii. § cciv-v; Bluntschli, § 200. Calvo (§ 525) still thinks that 'au milieu des troubles civils qui surviennent dans un pays, l'hôtel d'une légation puisse et doive même offrir un abri assuré aux hommes politiques qu'un danger de vie force à s'y réfugier momentanément.'

The European usage became fixed in the course of last century. The question may perhaps have been open in 1726 when the Duke of Ripperda was taken by force from the house of the English ambassador at Madrid, with whom he had taken refuge; by the time of Vattel it seems to have been settled that political offenders must be given up, though ordinary criminals might be sheltered; the right to receive the latter died gradually away with the growth of respect for public order, but De Martens, even in the later editions of his Précis, mentions it as being still recognised at some courts. For the details of the leading cases of the Duke of Ripperda and of Springer, a merchant accused of high treason, who took refuge in the English embassy at Stockholm in 1747, see De Martens, Causes Cél. i. 178, and ii. 52.

ment of the United States suggested, but apparently without success, that the chief powers should combine in instructing their agents to refuse asylum for the future.

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§ 53. When a crime has been committed in the house of a diplomatic agent, or by a person in his employment, it may occur that his evidence or that of one of his family or suite is necessary for the purposes of justice. In such cases the state has no power to compel the person invested with immunity to give evidence, and still less to make him appear before the courts for the purpose of doing so. It is customary therefore for the minister of foreign affairs to apply to the diplomatic agent for the required depositions, and though the latter may in strictness refuse to make them himself, or to allow persons under his control to make them, it is the usage not to take advantage of the right. Generally the evidence wanted is taken before the secretary of legation or some official whom the minister consents to receive for the purpose. When so taken it is of course communicated to the court in writing. But where by the laws of the country evidence must be given orally before the court, and in the presence of the accused, it is proper for the minister or the member of the mission whose testimony is needed to submit himself for examination in the usual manner. In 1856, a homicide having been committed at Washington in presence of the Dutch minister, he was requested to appear and to give evidence in the matter. He refused; offering however to make a deposition in writing upon oath, if his government should consent to his doing so. As the Dutch government supported him in the course which he took, his evidence was not given, and the affair ended by his recall being demanded by the government of the United States<sup>1</sup>.

Mode in which the evidence of a diplomatic agent is obtained for the courts.

The person of a diplomatic agent, his personal effects, and the property belonging to him as representative of his sovereign, are not subject to taxation. Otherwise he enjoys no exemption from taxes or duties as of right. By courtesy

Immunities from taxation.

<sup>1</sup> Calvo, § 524 and n.; Halleck, i. 294.

PART II. however most, if not all, nations permit the entry free of duty  
 CHAP. IV. of goods intended for his private use<sup>1</sup>.

Domicile of  
 a diploma-  
 tic agent.

His power  
 to legalise  
 acts done  
 according  
 to the  
 forms pre-  
 scribed in  
 his own  
 country.

Two particulars only remain to be noted with respect to the legal position of a diplomatic agent. Of these the first is that he preserves his domicile in his own country, as a natural consequence of the fact that his functions are determinable at the will of his sovereign, and that he has therefore no intention of residence. The second is that notwithstanding the general rule that acts intended to have legal effect, in order to have such effect in the country where they are done, must conform to the territorial law, a diplomatic agent may legalise wills and other unilateral acts, and contracts, including perhaps contracts of marriage, made by or between members of his suite. It is said by some writers that a diplomatic agent may also legalise marriages between subjects of his state, other than members of his suite, if specially authorised to do so by his sovereign<sup>2</sup>; and Great Britain and Germany do as a matter of fact invest their ambassadors and ministers with the power. It may be doubtful however whether the courts of most states, in dealing with effects of such marriages performed within their own territory, would recognise their validity<sup>3</sup>.

<sup>1</sup> Calvo, § 529; Bluntschli, § 222; Halleck, i. 298. But for the intolerance of men, which has always been ready to repress religious freedom at any cost of inconsistency, it would never have been necessary as against extraterritoriality to lay down expressly that a diplomatic agent has a right to the exercise of his religion in a chapel within his own house, provided that he does not provoke attention by the use of bells. As the local authorities have no right of entry, except for the reasons mentioned above, they ought to be officially ignorant of everything occurring in the house, so long as it is not accompanied by external manifestations. Most writers are however careful to state that the privilege exists. Its possession is now happily too much a matter of course to make it worth while to notice it in the text.

<sup>2</sup> Calvo, § 537; Heffter, § 216; Le Clercq and De Vallat, *Guide Pratique des Consulats*, quoted by Lawrence, *Commentaire*, iii. 376. The *Guide Pratique* was issued officially by the French government, but its doctrine on this point is at variance with that to which the French courts have given effect.

<sup>3</sup> On the whole subject see Lawrence, *Commentaire*, iii. 357-78. It is certain that in many countries the marriage of a subject of the state with a foreigner in the house of the ambassador of the state to which the foreigner belongs, and according to the laws of that state, is not held to be good.

§ 54. The law with respect to the immunities of armed forces of the state in foreign territory has undergone so much change, or at least has become so much hardened in a particular direction, with the progress of time, and so much confusion might be imported into it, at any rate in England, by insufficient attention to the date of precedents and authorities, that the safest way of approaching the subject will be by sketching its history.

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Immunities of  
armed  
forces of  
the state.

Either from oversight, or as perhaps is more probable, because the exercise of exclusive control by military and naval officers not only over the internal economy of the forces under their command, but over them as against external jurisdiction, was formerly too much taken for granted to be worth mentioning, the older writers on international law rarely give any attention to the matter. Zouch is the only jurist of the seventeenth century who notices it, and the paragraph which he devotes to the immunities of armies and fleets is scarcely sufficient to give a clear idea of his views as to their extent<sup>1</sup>. Casaregis, in the eighteenth century, concedes exclusive jurisdiction to a sovereign over the persons composing his naval and military forces and over his ships, wherever they may be, on the ground that the exercise of such jurisdiction is necessary to the existence of a fleet or army<sup>2</sup>. Lampredi on the other hand asserts it to be the

History of  
opinion  
and usage.

<sup>1</sup> Dissertation concerning the punishment of Ambassadors, Trans. by D. J. p. 26. It is curious and interesting to find, as appears from a quotation in Zouch, that the fiction of the extritoriality of an army had come into existence, and seems to have been recognised, in the time of Baldus. Bartolus also said, according to Casaregis, 'quod licet quis non habet territorium si tamen habeat potestatem in certas personas, propter illas personas dicitur habere territorium.'

<sup>2</sup> 'Quum vero de exercitu, vel bellica classe, seu militaribus navibus, agitur, tunc tota jurisdictio super exercitum vel classem residet penes principem, aut ejus ducem, quamvis exercitus vel bellica classis existat super alieno territorio vel mari, quia ex belli consuetudine illa jurisdictio quam habet rex, seu princeps, aut illorum duces super exercitum prorogatur de suo ad aliorum territorium; tum quia absque tali jurisditione, exercitus vel classis conservari et consistere non posset tum etiam ex aliis rationibus de quibus apud infra scriptos doctores;' of whom he gives a long list. 'Quamobrem omnes et quoscunque, militiae suae, vel terrestres, vel maritimae, milites et homines, etiam in

PART II. admitted doctrine that an army in foreign territory is subject  
 CHAP. IV. to the local jurisdiction in all matters unconnected with military command; he maintains that the crew of a vessel of war in a foreign harbour is subjected to the same extent as land forces to the jurisdiction of the sovereign of the port, and that the vessel itself is part of his territory; he expressly adds that a criminal who has found refuge on board can be taken out of the ship by force. Such jurisdiction as he permits to be exercised on behalf of the sovereign of the military or naval force he rests, like Casaregis, upon the necessities of military command<sup>1</sup>. In 1794 a similar view was taken by the Attorney-General of the United States. An English sloop of war had entered the harbour of Newport in Rhode Island. While she was there it was reported that several American citizens were detained on board against their will. The

*alieno territorio delinquentes, princeps, vel illius dux, qualibet poena, etiam capitali plectere valet, vel quoscunque alios jurisdictionis actus erga eos exercere, ac si in proprio territorio maneret.* Discursus de Commercio, 136, 9.

Upon the above passage Sir A. Cockburn, in his Memorandum appended to the Report of the Fugitive Slave Commission, 1876 (p. xxxiii), argues that there is in it 'no express assertion as to extritoriality in the sense in which that term is now used, namely, as excluding the local jurisdiction.' There is no doubt no such express assertion, but exclusive jurisdiction is necessarily implied in the language which gives a sovereign the same jurisdiction over his troops and naval forces in foreign countries as he has over them at home. In his own dominions he does not admit concurrent jurisdiction.

<sup>1</sup> The illusion of extritoriality, he says, 'scompare subito ch  si rifletta che questo esercizio di giurisdizione non   fondato sul gius del territorio, ma sulla natura del comando militare, il quale s'intende restare intatto e nel suo pieno vigore ogni volta che il sovrano del luogo si contenta di ricevere una nave di guerra come tale. . . . Escluso questo comando militare, che per la qualit  e natura della nave da guerra resta intatto, per ogni altro riguardo e la nave s'intende territorio del sovrano del porto, e gli uomini di essa sottoposti alla sua giurisdizione. Lo che   tanto vero che   dottrina comune che anche un esercito straniero, che passa e dimora sopra l'altrui territorio,   sottoposto alla giurisdizione del luogo, escluso l'esercizio del comando militare, che resta intatto appresso il suo comandante per il consenso tacito del sovrano medesimo, il quale avendo concesso il passo o la dimora all' esercito forestiero s'intende aver concesso anche il comando militare, senza di cui esercito esser non pu  per la nota regola di ragione che concesso un diritto, s'intende concesso tutto ci  senza cui quel diritto esercitare non si potrebbe.' Del Commercio dei Popoli Neutrali in tempo di guerra, p<sup>te</sup> 1<sup>ma</sup>,   x. Azuni (pt. i. ch. iii. art. vii) appropriates the language of Lampredi without alteration.



General Assembly of the State having taken the matter into consideration resolved that five persons should go on board to ascertain whether the alleged facts were true, and the captain, who was on shore, acting apparently under some personal constraint, furnished the deputation with a letter requiring the officer in temporary command to afford them every assistance. On an investigation being made on board it was found that six men were Americans. These were discharged by order of the captain, and the vessel was then allowed to take in provisions, of which she was in want, and which she had until then been prevented from obtaining. The British Minister at Washington complained that 'the insult' was 'unparalleled, since the measures pursued were directly contrary to the principles which in all civilised states regulate cases of this nature; for if on the arrival of a ship of war in a European port, information be given that the ship of war has on board subjects of the sovereign of that port, application is made to the officer commanding her, who himself conducts the investigation, and if he discovers that any subjects be on board of his vessel, he immediately releases them; but if he be not satisfied that there be any such, his declaration to that effect, on his word of honour, is universally credited.' The question being referred to the Attorney-General by his government, he says that 'the laws of nations invest the commander of a foreign ship of war with no exemption from the jurisdiction of the country into which he comes,' and 'conceives that a writ of habeas corpus might be legally awarded in such a case, although the respect due to the foreign sovereign may require that a clear case be made out before the writ may be directed to issue<sup>1</sup>.' A few years later an

<sup>1</sup> Report of the Commission on Fugitive Slaves, p. lxxiii. Mr. Rothery argues with reference to this case that the British minister 'nowhere complains of the illegal character of these proceedings, or that the local authorities had no right to demand the delivery up of American subjects held on board against their will; there is here no claim of extritoriality; no pretence that a ship of war is exempt from interference by the local authorities.' The word 'illegal'



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opinion to the same effect was given by a subsequent Attorney-General. In a case which arose in connection with the English packet *Chèsterfield* he advised that 'it is lawful to serve civil or criminal process upon a person on board a British ship of war lying in the harbour of New York;' in coming to this conclusion he relied partly upon general considerations and partly upon an Act of Congress, of June 5, 1794, which enacted 'that in every case in which any process issuing out of any court of the United States shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of the subjects or citizens of such prince or state, it shall be lawful for the President of the United States to employ such part of the land and naval force of the United States or of the militia thereof as shall be judged necessary<sup>1</sup>.' It is said that the same doctrine as that laid down by the Attorney-General of the United States in 1794 would probably be held by the courts of Great Britain<sup>2</sup>; it is certain that the pretension to search vessels of war, so long made by England, was incompatible with an acknowledgment that they possess a territorial character; and Lord Stowell, on being consulted by his government in 1820, with reference to the case of an Englishman who took refuge on board a man of war at Callao after escaping from prison, into

is no doubt not used; but it is not commonly used in diplomatic notes. In stating a custom as universal, and stigmatising action at variance with it as being contrary to the 'principles' guiding nations in such matters, the minister clearly indicates that the measures complained of were in his view illegal. In his opinion the law probably was this:—The captain of a ship of war has no right to keep subjects of a foreign state on board against their will within the territorial waters of their own country; the authorities of the state have no right to enter the ship or to employ measures of constraint; if they have reason to believe that subjects of the state are improperly kept on board, and they are unable to procure their release from the commander, their remedy is by complaint to his sovereign.

<sup>1</sup> Report of Commission on Fugitive Slaves, p. lxxv. The act must of course be read subject to whatever may be the ascertained rules of international law from time to time.

<sup>2</sup> Phillimore, i. § cccxvi.

which he had been thrown for political reasons, answers the question, 'whether any British subject coming on board one of his Majesty's ships of war in a foreign port escaping from civil or criminal process in such port, and from the jurisdiction of the state within whose territory such port may be situated, is entitled to the protection of the British flag, and to be deemed as within the kingdom of Great Britain and Ireland,' by saying that he had 'no hesitation in declaring that he knew of no such right of protection belonging to the British flag, and that he thought such a pretension unfounded in point of principle, injurious to the rights of other countries, and inconsistent with those of our own;' and added that 'the Spaniards would not have been chargeable with illegal violence if they had thought proper to employ force in taking' the person whose case was under discussion 'out of the British vessel <sup>1</sup>.'

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So far the opinion of Casaregis and the statement made by the British minister at Washington in 1794 with respect to the then custom of nations has to be weighed against the opinion of Lampredi and the views which, there is strong reason to believe, were predominant in the United States and England. But the doctrines held in the United States have changed, and the practice of England has not been uniform. In 1812<sup>2</sup> Chief Justice Marshall took occasion, in delivering judgment in a case turning upon the competence of the judicial tribunals of a state to entertain a question as to the title to or ownership of a public armed ship in the service of a foreign country, to lay down the principles of law which in the opinion of the Supreme Court were applicable to a vessel of war in the territorial waters of another state. According to him the 'purposes for which a passage is granted' to the troops or ships of a foreign power 'would be defeated, and a portion of the military force of a foreign, independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the

<sup>1</sup> Report of Commission on Fugitive Slaves, p. lxxvi.

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control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force' unless the exercise of jurisdiction were abandoned by the territorial sovereign; 'the grant of a free passage' or the permission to enter ports 'therefore implies a waiver of all jurisdiction.' The immunity thus conceded rested no doubt upon a consent to the usage which might be withdrawn by any particular state, but it could only be withdrawn by notice given before the entry of the force over which it might be attempted to exercise jurisdiction, and 'certainly in practice nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.' The doctrine is afterwards qualified by the proviso that a ship entering the ports of a foreign power shall 'demean herself in a friendly manner<sup>1</sup>.' The expression is somewhat vague, and may possibly leave a vessel subject to the ordinary jurisdiction of the courts in so far as a state act of which it is the vehicle renders it obnoxious to the territorial law. Such a construction would however be forced, and in any case the vessel is evidently regarded as covering the persons on board her from both civil and criminal jurisdiction in respect of all matters affecting them only as individuals. The opinion of Wheaton and Halleck concurs with that of Chief Justice Marshall, upon whose judgment indeed it may be regarded as founded.

<sup>1</sup> The Schooner *Exchange v. M'Faddon*, vii Cranch, 141-6. The view taken by Justice Story (*La Santissima Trinidad*, vii Wheaton, 353) of the intention of Chief Justice Marshall seems to be different from that which is taken above. It is to be noticed however that in paraphrasing the language of the Chief Justice he uses the expression 'according to law and in a friendly manner' instead of the words 'in a friendly manner' alone, thus wholly changing the effect of the clause. As also he puts sovereigns and public vessels of war on the same footing, he either gives larger immunities to ships than he would appear at first sight to be willing to concede, or he rejects the universally received doctrine as to the immunities of sovereigns. Wheaton (pt. ii. ch. ii. § 9) evidently regards the language of the Chief Justice as referring only to 'acts of hostility,' and as merely sanctioning the use by 'the local tribunals and authorities' of such 'measures of self-defence as the security of the state may require.'

Dr. Woolsey goes further, and adopts the doctrine of ex-territoriality, which was also asserted by Mr. Cushing, when Attorney-General of the United States. In 1856 a vessel called the *Sitka*, captured by the English from the Russians, entered the harbour of San Francisco with a prize crew and some Russian prisoners on board. Application being made to the Californian courts on behalf of the latter a writ of habeas corpus was issued, upon service of which the *Sitka* set sail without obeying its order. The government of the United States being doubtful whether a cause of complaint had arisen against England, referred the question to their Attorney-General, who advised that the courts of the United States have 'adopted unequivocally the doctrine that a public ship of war of a foreign sovereign, at peace with the United States, coming into our ports and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country. She remains a part of the territory of her sovereign. . . . The ship' which the captain of the *Sitka* 'commanded was a part of the territory of his country; it was threatened with invasion from the local courts; and perhaps it was not only lawful, but highly discreet, in him to depart and avoid unprofitable controversy<sup>1</sup>.' Turning to England, it is no doubt true that under the Customs Acts foreign ships of war are liable to be searched, and that it has been the practice to surrender slaves who have taken refuge on board English war vessels lying in the waters of states where slavery exists under sanction of the territorial law; but, on the other hand, political refugees have often been received on board British men of war, the Admiralty Instructions inform officers in command that 'during political disturbances or popular tumults refuge may be afforded to persons flying from immediate personal danger,' and in a letter, written by order of Lord Palmerston in 1849 with reference to the occurrences then taking place in Naples and Sicily, it is stated that 'it

<sup>1</sup> Wheaton, Elem. pt. ii. ch. ii. § 9; Halleck, i. 176; Woolsey, § 54 and 64; Report of Commission on Fugitive Slaves, p. xl.

PART II. would not be right to receive and harbour on board a British  
 CHAP. IV. ship of war any person flying from justice on a criminal  
 charge, or who was escaping from the sentence of a court  
 of law ; but a British ship of war has always and everywhere  
 been considered as a safe place of refuge for persons of what-  
 ever country or party who have sought shelter under the  
 British flag from persecution on account of their political  
 conduct or opinions.' As persons who are in danger of their  
 life because of their political acts are usually looked upon as  
 criminals by the successful party in the state, the distinction  
 here drawn is clearly one of mere propriety. In law, the  
 right of asylum is upheld. Finally, so far as England is con-  
 cerned, Sir R. Phillimore, Sir Travers Twiss, Sir W. Harcourt,  
 and Mr. Bernard are agreed in holding that the laws of a  
 state cannot be forcibly executed on board a foreign vessel of  
 war lying in its waters unless by the order or permission of  
 the commanding officer<sup>1</sup>.

There not being indications that opinion has varied in  
 other countries to the same extent as in England and the  
 United States, the views at present entertained on the con-  
 tinent of Europe may be dismissed more quickly. In France  
 the territoriality of a vessel of war is distinctly asserted by  
 most writers, and the practice of the courts with regard to  
 mercantile ships raises a strong presumption that public  
 vessels would be considered by them to possess immunity  
 in the highest degree<sup>2</sup>. In Germany and Italy it appears,

<sup>1</sup> 16 and 17 Vict. c. 107. sect. 52 ; Mundy's H.M.S. Hannibal at Palermo, p. 76 ; Opinion of Sir R. Phillimore and Mr. Bernard, Rep. of Fugitive Slave Commission, p. xxvi ; Letter of Historicus to the *Times* of Nov. 4, 1875, quoted *ib.* p. lxii ; Law Magazine and Review, No. ccxix. The majority of the Fugitive Slave Commission appears to have adopted views which would reduce the immunities of vessels of war to a shadow ; but in the special matter of International Law their authority cannot be regarded as equal to that of the four jurists above mentioned.

<sup>2</sup> Ortolan, who was himself a naval officer, says 'la coutume internationale est constante : ces navires restent régis uniquement par la souveraineté de leur pays ; les lois, les autorités et les juridictions de l'état dans les eaux duquel ils sont mouillés leur restent étrangères ; ils n'ont avec cet état que des relations internationales, par la voie des fonctionnaires de la localité compétents pour de

from information given by the governments of those countries to the English Commission on Fugitive Slaves, that a ship of war is regarded as part of the national territory, and by the latter state it is expressly declared that 'a slave who might take refuge on an Italian ship, considered by the government as a continuance of the national territory, whether on the high seas or in territorial waters, must be considered as perfectly free.' The works of MM. Heffter and Bluntschli show that the jurists of Germany are in agreement with their government. That the doctrine accepted in Spain is similar may be inferred from its occurrence in the text-book which is used by royal order in the naval academies<sup>1</sup>.

§ 55. From what has been said it is clear that there is now a great preponderance of authority in favour of the view that a vessel of war in foreign waters is to be regarded as not subject to the territorial jurisdiction. This being the case the law may probably be stated as follows:—

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Immunities of public vessels.

A vessel of war, or other public vessel of the state, when in foreign waters is exempt from the territorial jurisdiction; but her crew and other persons on board of her cannot ignore the laws of the country in which she is lying, as if she constituted a territorial enclave. On the contrary, those laws must as a general rule be respected. Exceptions to this obligation exist, in the case of acts beginning and ending on board the ship and taking no effect externally to her, firstly in all matters in which the economy of the ship or the relations of

*pareilles relations* (Dip. de la Mer, liv. ii. ch. x). Foelix, liv. ii. tit. ix. ch. i. § 544, in effect says that a vessel of war remains 'a continuation of the territory' when in foreign waters. See also Hautefeuille, tit. vi. ch. i. sect. 1.

<sup>1</sup> Report of the Fugitive Slave Commission, p. viii. Heffter, § 79, dismisses the subject in a few words, but the scope of his views may be judged from his references; Bluntschli, § 321—this section must be read by the light of the previous sections on extritoriality; Negrin, *Tratado de Derecho Internacional Maritimo*, tit. i. cap. iv. See also Riquelme, i. 228. The general tenour of the language of Fiore (ii. 392-6) is somewhat adverse to the immunities of vessels of war. He says no doubt that the local sovereign cannot 'pénétrer dans l'intérieur,' but it is not absolutely certain that anything but the discipline of the ship is present to his mind.

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persons on board to each other are exclusively touched<sup>1</sup>, and secondly to the extent that any special custom derogating from the territorial law may have been established,—perhaps also in so far as the territorial law is contrary to what may be called the public policy of the civilised world. In the case of acts done on board the vessel, which take effect externally to her, the range of exception is narrower. The territorial law, including administrative rules, such as quarantine regulations and rules of the port, must be respected to the exception, it is probable, of instances only in which there is a special custom to the contrary. When persons on board a vessel protected by the immunity under consideration fail to respect the territorial law within proper limits the aggrieved state must as a rule apply for redress to the government of the country to which the vessel belongs,—all ordinary remedies for, or restraints upon, the commission by persons so protected of wrongful acts affecting the territory of a state being forbidden. In extreme cases however, as where the peace of a country is seriously threatened or its sovereignty is infringed, measures may be taken against the ship itself, analogous to those which under like circumstances may be taken against a sovereign; it may be summarily ordered out of the territory, and it may if necessary be forcibly expelled.

Thus—to illustrate some of the foregoing doctrines—under the general rule of respect for the laws of a state it is wrong for a ship to harbour a criminal or a person charged with non-political crimes. If however such a person succeeds in getting on board, and is afforded refuge, he cannot be taken out of the vessel. No entry can be made upon her for any purpose whatever. His surrender, which is required by due respect for the territorial law, must be obtained diplomatically. In like manner, if an offence is committed on

<sup>1</sup> The case, which however would be extremely rare on board a ship of war, of a crime committed by a subject of the state within which the vessel is lying against a fellow-subject, would no doubt be an exception to this. It would be the duty of the captain to surrender the criminal.



board which takes effect externally and the captain refuses to make reparation,—if, for example, he were to refuse to give up or to punish a person who while within the vessel had shot another person outside,—application for redress must be made to the government to which the ship belongs. If, on the other hand, the captain of a vessel were to allow political refugees to maintain communication with the shore and to make the ship a focus of intrigue, or if he were to send a party of marines to arrest a deserter, an extreme case would arise, in which the imminence of danger in the one instance, and in the other the disregard of the sovereign rights of the state, would justify the exceptional measure of expulsion. The case is again different if a political refugee is granted simple hospitality. The right to protect him has been acquired by custom. He ought not to be sought out or invited, but if he appears at the side of the ship and asks admittance he need not be turned away, and so long as he is innoxious the territorial government has no right either to demand his surrender or to expel the ship on account of his reception. It is a more delicate matter to indicate cases in which the local law may be disregarded on the ground of its repugnance to the public policy of the civilised world. It may indeed be doubtful whether any municipal law now existing in civilised or semi-civilised states has been so settled to be repugnant to public policy that a fair right to disregard it has arisen. It can only be said that it may be open to argument whether the reception of slaves might not be so justified.

When acts are done on board a ship which take effect outside it, and which if done on board an unprivileged vessel would give a right of action in the civil tribunals, proceedings in the form of a suit may perhaps be taken, provided that the court is able and willing to sit as a mere court of enquiry, and provided consequently that no attempt is made to enforce the judgment. In at least one case the British Admiralty has paid damages awarded by a foreign court against the captain of a ship of war in respect of a collision



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 CHAP. IV. however be clearly understood that the judgment of the court can have no operative force; the proceedings taken can only be a means of establishing the facts which have occurred; and the judgment given can only be used in support of a claim diplomatically urged when its justice is not voluntarily recognised by the foreign government<sup>1</sup>.

The immunities of a vessel of war belong to her as a complete instrument, made up of vessel and crew, and intended to be used by the state for specific purposes; the elements of which she is composed are not capable of separate use for those purposes; they consequently are not exempted from the local jurisdiction. If a ship of war is abandoned by her crew she is merely property; if members of her crew go outside the ship or her tenders or boats they are liable in every respect to the territorial jurisdiction. Even the captain is not considered to be individually exempt in respect of acts not done in his capacity of agent of his state. Possessing his

<sup>1</sup> As the language of Lord Stowell in the case of the *Prinz Frederik* (ii Dodson, 484) suggests that under his guidance the English courts might have asserted jurisdiction over a ship of war, to which salvage services have been rendered, for remuneration in respect of such services, and as Sir R. Phillimore, in the case of the *Charkieh* (iv Law Rep., Admiralty, 93 and 96, 1873) expressed a strong doubt upon the point, and at any rate was 'disposed' to hold that 'within the ebb and flow of the sea the obligatio ex quasi contractu attaches jure gentium upon the ship to which the service has been rendered,' it may be worth while to notice that in a recent case the latter judge decided that proceedings for salvage could not be taken against a foreign public vessel. In January, 1879, the United States frigate *Constitution*, laden with machinery which was being taken back to New York from the Paris Exhibition at the expense of the American government, went aground upon the English coast near Swanage. Assistance was rendered by a tug; and a disagreement having taken place between its owner and the agents of the American government as to the amount of the remuneration to which the former was fairly entitled, application was made for a warrant to issue for the arrest of the *Constitution* and her cargo. The American government objected to the exercise of jurisdiction by the court; the objection was supported by counsel on behalf of the crown; and the application was refused on the ground that the vessel 'being a war frigate of the United States navy, and having on board a cargo for national purposes, was not amenable to the civil jurisdiction of this country.' *Times*, January 29, 1879.

ship, in which he is not only protected, but in which he has entire freedom of movement, he lies under no necessity of exposing himself to the exercise of the jurisdiction of the country, and if he does so voluntarily he may fairly be expected to take the consequences of his act. PART II.  
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§ 56. Military forces enter the territory of a state in amity with that to which they belong, either when crossing to and fro between the main part of their country and an isolated piece of it, or as allies passing through for the purposes of a campaign, or furnishing garrisons for protection. In cases of the former kind, the passage of soldiers being frequent, it is usual to conclude conventions, specifying the line of road to be followed by them, and regulating their transit so as to make it as little onerous as possible to the population among whom they are. Under such conventions offences committed by soldiers against the inhabitants are dealt with by the military authorities of the state to which the former belong; and as their general object in other respects is simply regulatory of details, it is not necessary to look upon them as intended in any respect to modify the rights of jurisdiction possessed by the parties to them respectively<sup>1</sup>. There can be no question that the concession of jurisdiction over passing troops to the local authorities would be extremely inconvenient; and it is believed that the commanders, not only of forces in transit through a friendly country with which no convention exists, but also of forces stationed there, assert exclusive jurisdiction in principle in respect of offences committed by persons under their command, though they may be willing as a matter of concession to hand over culprits to the civil power when they have confidence in the courts, and when their stay is likely to be long enough to allow of the case being watched. The existence of a double jurisdiction in a foreign country being

<sup>1</sup> See for example the Etappen Convention between Prussia and Hanover in 1816, or that between Prussia and Brunswick in 1835 (De Martens, *Nouv. Rec.* iv. 321, and *Nouv. Rec. Gén.* vii. i. 60).

PART II. scarcely compatible with the discipline of an army, it is  
 CHAP. IV. evident that there would be some difficulty in carrying out  
 any other arrangement.

Reasons  
 for dis-  
 carding the  
 fiction of  
 exterritoriality.

§ 57. If the view which has been presented of the extent and nature of the immunities which have been hitherto discussed be correct, it is clear that the fiction of exterritoriality is not needed to explain them, and even that its use is inconvenient. It is not needed, because the immunities possessed by different persons and things can be accounted for by referring their origin to motives of simple convenience or necessity, and because there is a reasonable correspondence between their present extent and that which would be expected on the supposition of such an origin. The only immunities, in fact, upon the scope of which the fiction of exterritoriality has probably had much effect are those of a vessel of war, which seem undoubtedly to owe some of the consolidation which they have received during the present century to its influence. The fiction is moreover inconvenient, because it gives a false notion of identity between immunities which are really distinct both in object and extent, and because no set of immunities fully corresponds with what is implied in the doctrine. Nothing in any case is gained by introducing the complexity of fiction when a practice can be sufficiently explained by simple reference to requirements of national life which have given rise to it; where the fiction fails even to correspond with usage, its adoption is indefensible.

Merchant  
 vessels in  
 the ports  
 of a foreign  
 state.

§ 58. Merchant vessels lying in the ports of a foreign state enjoy a certain amount of immunity from the local jurisdiction by the practice of France, and there are some writers who pretend that the practice has been incorporated into international law. The notion that merchant vessels have a right to immunity is closely connected with the doctrine, which with reference to them will be discussed in a later chapter, that ships are floating portions of the country upon which they depend; and perhaps apart from this doctrine

it would not have acquired the influence which it possesses ; PART II.  
 but the two are not inseparable, and so far as appears from CHAP. IV.  
 a judgment of the Court of Cassation, which settled the  
 French law upon the subject, the practice was not originally  
 founded on the doctrine. It may therefore be considered  
 independently, and it will not lose by dissociation from an  
 inadmissible fiction.

According to the view held in France the crew of a merchant ship lying in a foreign port is unlike a collection of isolated strangers travelling in the country ; it is an organised body of men, governed internally in conformity with the laws of their state, enrolled under its control, and subordinated to an officer who is recognised by the public authority ; although therefore the vessel which they occupy is not altogether a public vessel, yet it carries about a sort of atmosphere of the national government which still surrounds it when in the waters of another state. Taking this view, the French government and courts have concluded that 'there is a distinction between acts relating solely to the internal discipline of the vessel, or even crimes and lesser offences committed by one of the crew against one another, when the peace of the port is not affected, on the one hand, and on the other, crimes or lesser offences committed upon or by persons not belonging to the crew, or even by members of it upon each other, provided in the latter case that the peace of the port is compromised.' In two instances it has been held by the superior courts that in cases of the former kind the local authorities have not jurisdiction, and in another, the court of Rennes having some doubt as to the applicability of the principle upon which the earlier cases were decided, the government, on being consulted, directed that the offender should be given into the custody of the authorities on board his own ship<sup>1</sup>.

Outside France little disposition has been shown to put

<sup>1</sup> Ortolan, *Dip. de la Mer*, liv. ii. ch. x. and xiii, and *Append.*, *Annexe J.*

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forward these views as representing actual law<sup>1</sup>; and that they are at present destitute of international authority is unquestionable; but a considerable number of recent consular conventions stipulate that consuls shall have exclusive charge of the purely internal order of the merchant vessels of their nation, and that the local authorities shall only have a right of interference when either the peace or public order of the port or its neighbourhood is disturbed, or when persons other than the officers and crew of a ship are mixed up in the breach of order which is committed<sup>2</sup>. The practice which is being

<sup>1</sup> They were urged by Mr. Webster in the correspondence on the *Creole* case. 'The rule of law,' he says, 'and the comity and practice of nations allow a merchant vessel coming into any open port of another country voluntarily, for the purpose of lawful trade, to bring with her and keep over her to a very considerable extent, the jurisdiction and authority of the laws of her own country. A ship, say the publicists, though at anchor in a foreign harbour, possesses its jurisdiction and its laws. . . . It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider, or so assert, it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must doubtless be answerable to the laws of the place. Nor if the master and crew while on board in such port break the peace of the community by the commission of crimes can exemption be claimed for them. But nevertheless the law of nations as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations in modern times do clearly hold that the jurisdiction and laws of a nation accompany her ships, not only over the high seas, but into ports and harbours, or wheresoever else they may be water borne, for the general purpose of governing and regulating the rights, duties and obligations of those on board thereof; and that to the extent of the exercise of this jurisdiction they are considered as parts of the territory of the nation itself.' He went on to argue that slaves, so long as they remained on board an American vessel in English waters, did not fall under the operation of English law. Mr. Webster to Lord Ashburton, Aug. 1, 1842, *State Papers*, 1843. lxi. 35. Mr. Webster would have been embarrassed if he had been compelled to prove the legal value of all that he above states to be law by reference to sufficient authority.

Wheaton, though not originally in favour of these views, is said to have subsequently adopted them; they are apparently thought by Halleck (i. 191) to be authoritative, and are broadly laid down as being so by Negrin (104). Massé (*Droit Commercial*, § 527) and Calvo (§ 259-61) approve of the practice without seeming to regard it as strictly authoritative. It is difficult to combine Bluntschli's 320th with his 319th section. Heffter (§ 79), Twiss (i. § 159), and Phillimore (i. § cccxlviii) simply state the existing law.

<sup>2</sup> Consular conventions between France and Chile in 1846 (*De Martens*,

founded by these conventions is so reasonable a one in the abstract, and seems so little open to practical objections, that it would probably be worth while to adopt it into the recognised usage of nations.

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CHAP. IV.

§ 59. There is the more reason for acceding to the French opinion as to the limits within which local jurisdiction over vessels lying in the ports of a country ought to be put in force, that its adoption would render the measure of jurisdiction in their case identical with that which must ultimately be agreed upon as applicable to merchant vessels passing through territorial waters in the course of a voyage.

Passing  
vessels.

The position in which the latter ought to be placed has hitherto been little attended to, and few cases have arisen tending to define it; but with the constantly increasing traffic of ships questions are more and more likely to present themselves, and it would be convenient that the broad and obvious line of conduct which is marked out by the circumstances of the case should be followed by all nations in common. It would also be convenient that the amount of jurisdiction to be exercised by a state in its ports and in its territorial waters in general should be made the same under a practice or understanding sufficiently wide to become authoritative. There is no reason for any distinction between

Nouv. Rec. Gén. xvi. i. 11), France and Nicaragua in 1859 (id. xvi. ii. 194), France and Italy in 1862 (Nouv. Rec. Gén. 2° Ser. i. 637), North German Confederation and Italy in 1868 (id. Nouv. Rec. Gén. xix. 16), North German Confederation and Spain in 1870 (ib. 29), Austria and the United States in 1870 (id. Nouv. Rec. Gén. 2° Ser. i. 47), the United States and Salvador in 1870 (ib. 90), Belgium and Spain in 1870 (ib. ii. 136), Spain and the Netherlands in 1871 (ib. 29), Germany and the United States in 1872 (id. Nouv. Rec. Gén. xix. 39), Austria and Portugal in 1873 (id. Nouv. Rec. Gén. 2° Ser. i. 474), Austria and Italy in 1874 (ib. 358), France and Russia in 1874 (ib. 621), Germany and Russia in 1874 (ib. 237), Russia and Italy in 1875 (ib. 398), Italy and the Netherlands in 1875 (ib. ii. 17), Germany and Costa Rica in 1876 (ib. 268), and Russia and Spain in 1876 (ib. 558). It is to be observed that these conventions have multiplied very rapidly. In the treaties of commerce between the United States and the Two Sicilies in 1855 (Nouv. Rec. Gén. xvi. i. 521), and between the Zollverein and Mexico in the same year (ib. xvi. ii. 265), consuls are given power to judge differences arising between masters and crews of vessels of their state 'as arbitrators.'

PART II. the immunities of a ship in the act of using its right of  
 CHAP. IV. innocent passage, and of a ship at rest in the harbours of the  
 — state ; and if there were any reason, it would still be difficult  
 to settle the point at which a distinction should be made.  
 Suppose, for example, a difference to be established between  
 the extent of the jurisdiction to which a passing vessel and a  
 vessel remaining within the territory, or entering a port, is  
 subjected ; is a vessel which from stress of weather casts  
 anchor for a few hours in a bay within the legal limits of a  
 port, though perhaps twenty miles from the actual harbour,  
 to be brought within the fuller jurisdiction ; and if not, in  
 what is entering a port to consist ?

Limits  
 within  
 which the  
 territorial  
 jurisdiction  
 ought to  
 be ex-  
 ercised  
 over them.

Looking at the case of passing vessels by itself, there  
 being at present no clear usage in the matter, a state must  
 be held to preserve territorial jurisdiction, in so far as it may  
 choose to exercise it, over the ships and the persons on  
 board, as fully as over ships and persons within other parts of  
 its territory<sup>1</sup>. At the same time it is evident that the  
 interests of the state are confined to acts taking effect outside  
 the ship. The state is interested in preventing its shore  
 fisheries from being poached, in repressing smuggling, and in  
 being able to punish reckless conduct endangering the lives  
 of persons on shore, negligent navigation by which the  
 death of persons in other ships or boats may have been caused,  
 and crimes of violence committed by persons on board upon  
 others outside ; and not only is it interested in such cases,  
 not only may it reasonably be unwilling to trust to justice  
 being done with respect to them by another state, it is also  
 more favourably placed for arriving at the truth when they  
 occur, and consequently for administering justice, than the

<sup>1</sup> Casaregis, De Commercio, disc. 136. 1 ; Wolff, Jus Gent. cap. i. § 131 ;  
 Lampredi, Pub. Jur. Theorem. pt. iii. cap. ii. § ix. 8 ; Wheaton, Elem. pt. ii.  
 ch. iv. § 6 ; Heffter, § 75. Much learning on the subject of the sovereignty of  
 a state over non-territorial waters, in its bearing on passing vessels, is to be  
 found in the judgment in *Reg. v. Keyn* (ii Law Rep., Exchequer Div. 63) ;  
 but the case was decided upon grounds of municipal and not of international  
 law.



country to which the vessel belongs can be. On the other hand, the state is both indifferent to, and unfavourably placed for learning, what happens among a knot of foreigners so passing through her territory as not to come in contact with the population. To attempt to exercise jurisdiction in respect of acts producing no effect beyond the vessel, and not tending to do so <sup>1</sup>, is of advantage to no one.

It seems then reasonable to conclude that states, besides exercising such jurisdiction as is necessary for their safety and for the fulfilment of their international duties, ought to reserve to themselves such ordinary jurisdiction as is necessary to maintain customs and other public regulations within their territorial waters, and to provide, both administratively and by way of civil and criminal justice, for the safety of persons and property upon them and the adjacent coasts <sup>2</sup>.

§ 60. A merchant vessel while on non-territorial waters being subject, as will be seen later <sup>3</sup>, to the sovereignty of that country only to which she belongs, all acts done on board her while on such waters are cognisable only by the courts of her own state, unless they be acts of piracy <sup>4</sup>. The effects of this rule appear to extend, as indeed is reasonable, to cases in which, after a crime has been committed by or upon a native of a country other than that to which the ship belongs, she enters a port of that state with the criminal on board <sup>5</sup>.

Freedom of a vessel entering a state from its jurisdiction in respect of acts done outside it by or upon its subjects.

§ 61. The broad rule has already been mentioned that as

<sup>1</sup> Of course in the case of infectious disease the mere anchorage of a vessel in places where there is a risk of the disease spreading may be prevented, although nothing has been done, and nothing has occurred, actually producing effect beyond the vessel.

<sup>2</sup> M. Bluntschli, in saying (§ 322) that '*les navires qui se bornent à longer les côtes d'un état dans la partie de la mer qui fait partie du territoire de ce dernier, sont soumis temporairement à la souveraineté de cet état, en ce sens qu'ils doivent respecter les ordonnances militaires ou de police prises par lui pour la sûreté de son territoire et de la population côtière,*' probably intends to cover the same range as that provided for above. He seems however to imply that the state has at present no more jurisdiction. If so, he goes too far.

<sup>3</sup> See § 77.

<sup>4</sup> See § 81.

<sup>5</sup> Ortolan, *Dip. de la Mer*, liv. ii. ch. viii; Twiss, i. 230.



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CHAP. IV.

How far  
a state can  
compel  
foreigners  
to help in  
maintain-  
ing the  
public  
safety.

an alien has not the privileges, so on the other hand he has not the responsibilities, attached to membership of the foreign political society in the territory of which he may happen to be. In return however for the protection which he receives, and the opportunities of profit or pleasure which he enjoys, he is liable to a certain extent, at any rate in moments of emergency, to contribute by his personal service to the maintenance of order in the state from which he is deriving advantage, and under some circumstances it may even be permissible to require him to help in protecting it against external dangers.

During the civil war in the United States the British government showed itself willing that foreign countries should assume to themselves a very liberal measure of rights in this direction over its subjects. Lord Lyons was instructed 'that there is no rule or principle of international law which prohibits the government of any country from requiring aliens, resident within its territories, to serve in the Militia or Police of the country or to contribute to the support of such establishments;' and though objection was afterwards taken to English subjects being compelled 'to serve in the armies in a civil war, where besides the ordinary incidents of battle they might be exposed to be treated as rebels and traitors in a quarrel in which, as aliens, they would have no concern,' it was at the same time said that the government 'might well be content to leave British subjects voluntarily domiciled in a foreign country, liable to all the obligations ordinarily incident to such foreign domicile, including, when imposed by the municipal law of such country, service in the Militia or National Guard, or Local Police, for the maintenance of internal peace and order, or even, to a limited extent, for the defence of the territory from foreign invasion <sup>1</sup>.' The case of persons domiciled or at least temporarily settled in the country seems to have been the only one contemplated in these instructions, and it is not probable that the English

<sup>1</sup> Naturalisation Commission, Append. to the Report, 42.

government would have regarded persons, who could not be called residents in any sense of the word, as being affected by such extended liabilities. But whether the latter was the case or not, and whether if it were so, there is any sufficient reason for making a distinction between residents and sojourners, the concession made to local authority seems unnecessarily large. If it be once admitted that aliens may be enrolled in a militia independently of their own consent, or that they may be used for the defence of the territory from invasion by a civilised power, it becomes impossible to have any security that their lives will not be sacrificed in internal disturbances producing the effects pointed out by Lord Russell as objectionable, or in quarrels with other states for the sake of interests which may even be at variance with those of their own country. It is more reasonable, and more in accordance with general principle, to say, as is in effect said by M. Bluntschli<sup>1</sup>, that—

1. It is not permissible to enrol aliens, except with their own consent, in a force intended to be used for ordinary national or political objects.

2. Aliens may be compelled to help to maintain social order, provided that the action required of them does not overstep the limits of police, as distinguished from political, action.

3. They may be compelled to defend the country against an external enemy when the existence of social order or of the population itself is threatened, when, in other words, a state or part of it is threatened by an invasion of savages or uncivilised nations<sup>2</sup>.

<sup>1</sup> § 391.

<sup>2</sup> In some treaties the compulsory enrolment of foreign subjects in state forces liable to be used for other than police purposes is expressly guarded against. In the commercial treaties made between France and Chile in 1846 (De Martens, *Nouv. Rec. Gén.* xvi. i. 3), France and Russia in 1857 (*ib.* 575), Italy and Mexico in 1870 (*Nouv. Rec. Gén.* 2<sup>e</sup> Ser. i. 429), the United States and Italy in 1871 (*ib.* 58), Russia and Peru in 1874 (*id.* ii. 579), and Germany and Costa Rica in 1876 (*ib.* 252), the subjects of each of the contracting states are exempted from service in the army, militia, or national

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CHAP. IV.

Crimes  
committed  
by foreign-  
ers in  
territory  
foreign to  
the state  
exercising  
jurisdic-  
tion.

§ 62. The municipal law of the larger number of European countries enables the tribunals of the state to take cognizance of crimes committed by foreigners in foreign jurisdiction. Sometimes their competence is limited to cases in which the crime has been directed against the safety or high prerogatives of the state inflicting punishment, but it is sometimes extended over a greater or less number of crimes directed against individuals. In France foreigners are punished who, when in another country, have rendered themselves guilty of offences against the safety of the French state, of counterfeiting the state seal or coin having actual currency, and of forgery of paper money; they cannot however be proceeded against *par contumace*. In Belgium the law is identical. In Germany the tribunals take cognizance of all acts committed abroad by foreigners which would constitute high treason if done by subjects of the German state, as well as of coining, of forging bank notes and other state obligations, and of uttering false coin and notes or other instruments the forging of which brings the foreigner under the jurisdiction of the German courts. In Austria the tribunals can take cognizance of all crimes committed by foreigners in another state, provided that, except in the case of like crimes to those punishable by French law, an offer has been first made to surrender the accused person to the state in which the crime has been committed, and has been refused by it. Italian law seems at present to be the same, with the exception that proceedings can be taken, without previous offer of surrender when the crime has been committed within three miles of the frontier, or

guard of the other party to the treaty. In the treaty of 1855 between the Zollverein and Mexico (Nouv. Rec. Gén. xvi. ii. 257) exemption of their respective subjects from forced military service is stipulated, 'mas no del de policia en los casos, en que para seguridad de las propiedades y personas fuere necesario su auxilio, y por solo el tiempo di esa urgente necesidad.' In the treaties between the United States and Costa Rica, 1851 (Nouv. Rec. Gén. xvi. i. 117), the Zollverein and Uruguay, 1856 (id. xvi. ii. 275), and the Zollverein and the Argentine Confederation, 1857 (ib. 309), exemption from military service only is stipulated, perhaps leaving open the question of the extent to which foreigners may be used in case of internal disturbance.

when stolen property has been brought into the kingdom. PART II.  
 As the refusal of an offer to surrender is the equivalent of CHAP. IV.  
 consent to the trial of a prisoner by the state making the  
 offer, when a municipal law providing for his punishment  
 exists there, the jurisdiction afterwards exercised does not  
 take the form of a jurisdiction exercised as of right; in  
 Austria and Italy therefore the claim to punish as of right  
 is only made in the case of crimes against the safety or  
 high prerogatives of the state. In the latter country the  
 criminal law is in course of revision, and some extravagant  
 proposals upon the subject under consideration have been made,  
 and appear to have temporarily received the sanction of at  
 least one branch of the legislature. Probably however the  
 existing law will ultimately remain unchanged in essentials.  
 In the Netherlands the list of punishable crimes, besides  
 those contemplated by French law, includes murder, arson,  
 burglary, and forgery of bills of exchange. In Norway  
 proceedings may be taken against any person accused of a  
 crime against the state, or Norwegian subjects, or foreigners  
 on board Norwegian vessels. Finally, in Russia foreigners  
 can be punished for taking part in plots against the existing  
 government, the emperor, or the imperial family, and for acts  
 directed against 'the rights of person or property of Russian  
 subjects'.

<sup>1</sup> Foelix, liv. ii. tit. ix. ch. iii; *Strafgesetzbuch für das Deutsches Reich*, einleitende Bestimmungen; Fiore, *Delits commis à l'étranger*, Rev. de Droit Int. xi. 302. Foelix gives the authorities for and against the validity of the laws in question, but without stating his own opinion. Calvo (§ 252) broadly asserts that there are certain '*faits délictueux ou criminels qui, en raison de leur caractère exceptionnel de gravité et des conséquences funestes qu'ils peuvent avoir, sont définis et punis par la loi pénale, abstraction faite du lieu où ils ont été commis.*' Dr. Woolsey (§ 78) more moderately says 'that states are far from universally admitting the territoriality of crime;' he adds that 'the principle' of its territoriality 'is not founded on reason, and that, as intercourse grows closer in the world, nations will more readily aid general justice.' The latter remark seems to connect him with De Martens (*Précis*, § 100), who, in conceding the power of criminal jurisdiction over foreigners in respect of acts done outside the state, contemplates its exercise rather by way of neighbourly duty, and in the interests of the foreign state, than as a privilege.

PART II. Whether laws of this nature are good internationally;  
 CHAP. IV.

whether, in other words, they can be enforced adversely to a state which may choose to object to their exercise, appears, to say the least, to be eminently doubtful. It is indeed difficult to see upon what they can be supported. Putting aside the theory of the non-territoriality of crime as one which unquestionably is not at present accepted either universally or so generally as to be in a sense authoritative, it would seem that their theoretical justification, as against an objecting country, if any is alleged at all, must be that the exclusive territorial jurisdiction of a state gives complete control over all foreigners, not protected by special immunities, while they remain on its soil. But to assert that this right of jurisdiction covers acts done before the arrival of the foreign subjects in the country is in reality to set up a claim to concurrent jurisdiction with other states as to acts done within them, and so to destroy the very principle of exclusive territorial jurisdiction to which the alleged rights must appeal for support. It is at least as doubtful whether the voluntary concession of such a right would be expedient except under the safeguard of a treaty. In cases of ordinary crimes it would be useless, because the act would be punishable under the laws of the country where it was done, and it would only be necessary to surrender the criminal to the latter. It might, on the other hand, be dangerous where offences against the national safety are concerned. The category of such acts is a variable one; and many acts are

Wheaton (Elem. pt. ii. ch. ii. § 19), with a truer appreciation of the nature of the practice, says that 'it cannot be reconciled with the principles of international justice.' See also Phillimore, i. § cccxxiii. Massé (§ 524) defends the practice by urging that 's'il est vrai que les lois répressives requies dans un état ne peuvent avoir d'autorité hors de cet état, cependant, lorsqu'un étranger s'est rendu coupable en pays étranger d'un crime qui viole les principes mêmes sur lesquels est fondée la société, qui porte atteinte aux personnes et aux propriétés, ne semble-t-il pas qu'en réprimant cet attentat et en punissant le coupable trouvé en France, les tribunaux ne feraient que remplir un devoir social qui rentre dans les limites de leur compétence naturelle?'

ranked in it by some states, to the punishment of which other countries might with propriety refuse to lend their indirect aid, by allowing a state to assume to itself jurisdiction in excess of that possessed by it in strict law.

§ 63. A state being at liberty to do whatever it chooses within its own territory, without reference to the wishes of other states, so long as its acts are not directly injurious to them, it has the right of receiving and giving hospitality or asylum to emigrants or refugees, whether or not the former have violated the laws of their country in leaving it, and whether the latter are accused of political or of ordinary crimes. So soon as an individual, not being at the moment in custody, asks to be permitted to enter the territory of a state, the state alone decides whether permission shall be given; and when he has been received the state is only bound, under its general responsibility for acts done within its jurisdiction, to take such precautions as may be necessary to prevent him from doing harm, by placing him for instance under surveillance or by interning him at a distance from the frontier, if there is reason to believe that his presence is causing serious danger to the country from which he has fled. On the failure of measures of this kind a right arises on the part of the threatened state to require his expulsion, so that it may be freed from danger; but under no circumstances can it exact his surrender<sup>1</sup>.

How far a state ought to allow its right of granting asylum to be subordinated to the common interest which all societies have in the punishment of criminals, and with or without special agreement should yield them up to be dealt with by the laws of their country, has been already considered.

§ 64. A state has necessarily the right in virtue of its territorial jurisdiction of conferring such privileges as it may choose to grant upon foreigners residing within it. It may therefore admit them to the status of subjects or citizens. But it is evident that the effects of such admission, in so far as

<sup>1</sup> Bluntschli, § 394, 396-398.

PART II. they flow from the territorial rights of a state, make them-  
 CHAP. IV. selves felt only within the state territory. Outside places  
 under the territorial jurisdiction of the state, they can only hold as long as they do not conflict with prior rights on the part of another state to the allegiance of the adopted subject or citizen. A state which has granted privileges to a stranger cannot insist upon his enjoyment of them, and cannot claim the obedience which is correlative to that enjoyment, outside its own jurisdiction as against another state, after the latter has shown that it had exclusive rights to the obedience of the person in question at the moment when he professed to contract to yield obedience to another government. If therefore the adoption of a foreigner into a state community frees him from allegiance to his former state, he must owe his emancipation either to an agreement between nations that freedom from antecedent ties shall be the effect of naturalisation, or to the existence of a right on his part to cast off his allegiance at will. Whether, or to what extent, such an agreement or right exists will be discussed elsewhere. For the moment it is only necessary to point out that such power as a state may possess, of asserting rights with reference to an adopted subject in derogation of rights claimed by his original sovereign, is not consequent upon the right to adopt him into the state community<sup>1</sup>.

Responsi-  
 bility of a  
 state,

§ 65. *Prima facie* a state is of course responsible for all acts or omissions taking place within its territory by which another state or the subjects of the latter are injuriously affected. To escape responsibility it must be able to show that its failure to prevent the commission of the acts in question, if not intended to be injurious, or its omission to do acts incumbent upon it, have been within the reasonable limits of error in practical matters, or if the acts or omissions have been intended to be injurious, that they could not have been prevented by the use of a watchfulness proportioned to the apparent nature of the circumstances, or by means at the

<sup>1</sup> See § 71.

disposal of a community well ordered to an average extent ; or else it must be able to show that the injury resulting from the acts or omissions has been either accidental or independent of any act done within the territory which could have been prevented as being injurious. PART II.  
CHAP. IV.  
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The foregoing general principle requires to be applied with the help of certain considerations suggested by the facts of state existence.

Although theoretically a state is responsible indifferently for all acts or omissions taking place within its territory, it is evident that its real responsibility varies much with the persons concerned. Its administrative officials and its naval and military commanders are engaged in carrying out the policy and the particular orders of the government, and they are under the immediate and disciplinary control of the executive. Presumably therefore acts done by them are acts sanctioned by the state, and until such acts are disavowed, and until, if they are of sufficient importance, their authors are punished, the state may fairly be supposed to have identified itself with them. Where consequently acts or omissions, which are productive of injury in reasonable measure to a foreign state or its subjects, are committed by persons of the classes mentioned, their government is bound to disavow them, and to inflict punishment and give reparation when necessary. in respect  
of acts  
done by  
1. admin-  
istrative,  
and naval  
and mili-  
tary agents,

Judicial functionaries are less closely connected with the state. There are no well-regulated states in which the judiciary is not so independent of the executive that the latter has no immediate means of checking the acts of the former ; judicial acts may be municipally right, as being according to law, although they may effect an international wrong ; and even where they are flagrantly improper no power of punishment may exist. All therefore that can be expected of a government in the case of wrongs inflicted by the courts is that compensation shall be made, and if the wrong has been caused by an imperfection in the law of such kind as to 2. judicial  
function-  
aries,



PART II. prevent a foreigner from getting equal justice with a native  
 CHAP. IV. of the country, that a recurrence of the wrong shall be  
 prevented by legislation.

3. private  
 persons.

With private persons the connection of the state is still less close. It only concerns itself with their acts to the extent of the general control exercised over everything within its territories for the purpose of carrying out the common objects of government; and it can only therefore be held responsible for such of them as it may reasonably be expected to have knowledge of and to prevent. If the acts done are undisguisedly open or of common notoriety, the state, when they are of sufficient importance, is obviously responsible for not using proper means to repress them; if they are effectually concealed or if for sufficient reason the state has failed to repress them, it as obviously becomes responsible, by way of complicity after the act, if its government does not inflict punishment to the extent of its legal powers<sup>1</sup>. If however attempts are made to disguise the true character of noxious acts, what amount of care to obtain knowledge of them

<sup>1</sup> In 1838 a body of men invaded Canada from the United States, after supplying themselves with artillery and other arms from a United States arsenal. Their proceedings were not of the nature of a surprise, and some of their preparations and acts of open hostility were carried on in the presence of a regiment of militia, which made no attempt to interfere. In 1866, the Fenians in the United States held public meetings at which an intention of invading Canada was avowed, and made preparations which lasted for several months, and were sufficiently notorious to induce the Canadian government to call out 10,000 volunteers three months before an attack was actually made. In the end of May they invaded Canada without opposition from the authorities of the United States. On being driven back their arms were taken from them; and some of the leaders were arrested, a prosecution being commenced against them in the district court of Buffalo. Six weeks afterwards it was resolved by the House of Representatives that 'this House respectfully request the President to cause the prosecutions instituted in the United States Courts against the Fenians to be discontinued if compatible with the public interests,' and the prosecutions were accordingly abandoned. In October the arms taken from the Fenians were restored.

It would be difficult to find more typical instances of responsibility assumed by a state through the permission of open acts and of notorious acts, and by way of complicity after the acts. Of course in gross cases like these a right of immediate war accrues to the injured nation.

beforehand, and to prevent their occurrence, may reasonably be expected? And is the legal power actually possessed by the government of a state the measure of the legal power which it can be expected to possess whether for purposes of prevention or of punishment?

PART II.  
CHAP. IV.  
—

Both these questions assumed considerable prominence during the proceedings of the tribunal of Arbitration at Geneva. With respect to the first it was urged by the United States that the 'diligence' which is due from one state to another is a diligence 'commensurate with the emergency or with the magnitude of the results of negligence.' Whether this doctrine represents the deliberate views of its authors, or whether it was merely put forward for the immediate purposes of argument, it is impossible to reprobate it too strongly. The true nature of an emergency is often only discovered when it has passed, and no one can say what results may not follow from the most trivial acts of negligence. To fail in preventing the escape of an interned subaltern might involve the loss of an empire. To make responsibility at a given moment depend upon an indeterminate something in the future is simply preposterous. The only measure of the responsibility arising out of a particular occurrence, which can be obtained from the occurrence itself, is supplied by its apparent nature and importance at the moment. If a government honestly gives so much care as may seem to an average intelligence to be proportioned to the state of things existing at the time, it does all it can be asked to do, and it cannot be saddled with responsibility for consequences of unexpected gravity. In no case moreover can it be reasonably asked in the first instance to use a care or to take means which it does not employ in its own interests. In a great many cases of the prevention of injury to foreign states care signifies the putting in operation of means of inquiry, and subsequently of administrative and judicial powers, with which a government is invested primarily for internal purposes. If these agencies have been found

PART II.  
CHAP. IV.

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strong enough for their primary objects a state cannot be held responsible because they have failed when applied to analogous international uses, provided that the application is honestly made. Whether on the occurrence of such failure a case arises for an alteration of the law or for an improvement in administrative organisation is a matter which falls under the second question.

How far  
a state  
must pro-  
vide itself  
with the  
means of  
preventing  
acts in-  
jurious to  
other  
states.

That a state must in a general sense provide itself with the means of fulfilling its international obligations is indisputable. If its laws are such that it is incapable of preventing armed bodies of men from collecting within it, and issuing from it to invade a neighbouring state, it must alter them. If its judiciary is so corrupt or prejudiced that serious and patent injustice is done frequently to foreigners, it ought to reform the courts, and in isolated cases it is responsible for the injustice done and must compensate the sufferers. On the other hand, it is impossible to maintain that a government must be provided with the most efficient means that can be devised for performing its international duties. A completely despotic government can make its will felt immediately for any purpose. It is better able than a less despotic government, and every government in so far as it is able to exercise arbitrary power, is better able than one which must use every power in strict subordination to the law, to give prompt and full effect to its international obligations. It has never been pretended however that a state is bound to alter the form of polity under which it chooses to live in order to give the highest possible protection to the interests of foreign states. To do so would be to call upon it to sacrifice the greater to the less, and to disregard one of the primary rights of independence—the right, that is to say, of a community to regulate its life in its own way. All that can be asked is that the best provision for the fulfilment of international duties shall be made which is consistent with the character of the national institutions, it being of course understood that those institutions are such that the state can be described

as well ordered to an average extent. A community has a right to choose between all forms of polity through which the ends of state existence can be attained, but it cannot avoid international responsibility on the plea of a deliberate preference for anarchy<sup>1</sup>.

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Although in a considerable number of cases questions have arisen out of conduct which has been or which has been alleged to be improper or inadequate as a fulfilment of the duties of a state in respect of its responsibility, it is not worth while to give examples here. It will be necessary in discussing the duties of neutrality to indicate for what acts, affecting the safety of a foreign country, a state may be held responsible, and what is there said may be taken as applicable to states in times of peace, subject only to the qualification that somewhat more forethought in the prevention of noxious acts should be shown during war, when their commission is not improbable, than during peace, when their commission may come by surprise upon the state within the territory of which they are done<sup>2</sup>. To give cases illustrating the circumstances under which a state is responsible for injuries or injustice suffered by foreign individuals would involve the statement of a mass of details disproportioned to the amount of information that could be afforded.

When a government is temporarily unable to control the acts of private persons within its dominions owing to insurrection or civil commotion it is not responsible for injury which may be received by foreign subjects in their person or property in the course of the struggle, either through the measures which it may be obliged to take for the recovery

Effect of  
civil com-  
motion  
upon  
responsi-  
bility.

<sup>1</sup> The subject of the responsibility of a state is not usually discussed adequately in works upon international law. It is treated more or less completely, or portions of it are commented on, in Bluntschli, § 466-9, bis; Halleck, i. 397; Calvo, § 284, 287-8, 290, 296; Phillimore, i. § cxxviii, and Preface to 2nd ed. p. xxi-ii; Reasons of Sir A. Cockburn for dissenting from the Award of the Tribunal of Arb. at Geneva, Parl. Papers, North Am. No. 2, 1873, p. 31-8; Hansard, cci. 1123.

<sup>2</sup> See pt. iv. ch. iii.

PART II. of its authority, or through acts done by the part of the  
 CHAP. IV. population which has broken loose from control. When  
 ——— strangers enter a state they must be prepared for the risks  
 of intestine war, because the occurrence is one over which  
 from the nature of the case the government can have no  
 control; and they cannot demand compensation for losses or  
 injuries received, both because, unless it can be shown that a  
 state is not reasonably well ordered, it is not bound to do  
 more for foreigners than for its own subjects, and no govern-  
 ment compensates its subjects for losses or injuries suffered  
 in the course of civil commotions, and because the highest  
 interests of the state itself are too deeply involved in the  
 avoidance of such commotions to allow the supposition to be  
 entertained that they have been caused by carelessness on its  
 part which would affect it with responsibility towards a  
 foreign state<sup>1</sup>.

Foreigners must in the same way be prepared to take the  
 consequences of international war.

<sup>1</sup> Bluntschli, § 380, bis. In the work of M. Calvo (§ 292-5) the subject is  
 dwelt upon with great detail.

## CHAPTER V.

### SOVEREIGNTY IN RELATION TO THE SUBJECTS OF THE STATE.

§ 66. It follows from the independence of a state that it may grant or refuse the privileges of political membership, in so far as such privileges have reference to the status of the person invested with them within the country itself, and it may accept responsibility for acts done by any person elsewhere which affect other states or their subjects. Primarily therefore it is a question for municipal law to decide whether a given individual is to be considered a subject or citizen of a particular state. But the right to give protection to subjects abroad, and the continuance of obligation on the part of subjects towards their state notwithstanding absence from its jurisdiction, brings the question, under what circumstances a person shall or shall not be held to possess a given nationality, within the scope of international law. Hitherto nevertheless it has refrained, except upon one point, from laying down any principles, and still more from sanctioning specific usages in the matter. It declares that the quality of a subject must not be imposed upon certain persons with regard to whose position as members of another sovereign community it is considered that there is no room for the existence of doubt, the imposition of that quality upon an acknowledged foreigner being evidently inconsistent with a due recognition of the independence of the state to which he belongs; but where a difference of legal theory

PART II.  
CHAP. V.  
\_\_\_\_\_  
Nationality.

PART II. can exist international law has made no choice, and it is  
 CHAP. V. left open to states to act as they like.

Persons as  
 to whose  
 nation-  
 ality

1. no dif-  
 ference of  
 opinion can  
 exist ;

§ 67. The persons as to whose nationality no room for difference of opinion exists are in the main those who have been born within a state territory of parents belonging to the community, and whose connection with their state has not been severed through any act done by it or by themselves. To these may be added foundlings, because their father and mother being unknown, there is no state to which they can be attributed except that upon the territory of which they have been discovered.

2. differ-  
 ence of  
 opinion can  
 exist.

The persons as to whose nationality a difference of legal theory is possible are children born of the subjects of one power within the territory of another, illegitimate children born of a foreign mother, foreign women who have married a subject of the state, and persons adopted into the state community by naturalisation, or losing their nationality by emigration.

Children  
 born of the  
 subjects  
 of one  
 power  
 within the  
 territory of  
 another.

§ 68. Under a custom, which was formerly so general as to be called by an eminent French authority 'the rule of Europe<sup>1</sup>,' and of which traces still exist in the legislation of many countries, the nationality of children born of the subjects of one power within the territory of another was dictated by the place of their birth, in the eye at least of the state of which they were natives. The rule was the natural outcome of the intimate connection in feudalism between the individual and the soil upon which he lived, but it survived the ideas with which it was originally connected, and probably until the establishment of the Code Napoleon by France no nation regarded the children of foreigners born upon its territory as aliens. In that Code however a principle was applied in favour of strangers, by which states had long been induced to guide themselves in dealing with their own subjects, owing to the inconvenience of looking upon the children of natives born abroad as foreigners. It was provided

<sup>1</sup> Demolombe, Cours de Code Napoleon, liv. i. tit. i. chap. i. No. 146.

that a child should follow the nationality of his parents<sup>1</sup>, and most civilised states, either in remodelling their system of law upon the lines of the Code Napoleon, or by special laws, have since adopted the principle simply, or with modifications giving a power of choice to the child, or else, while keeping to the ancient rule in principle, have offered the means of avoiding its effects. In Germany, Austria, Sweden, Norway and Switzerland national character follows parentage alone, and all these states claim the children of their subjects as being themselves subjects, wherever they may be born. The laws of France, Spain, Belgium, Greece and Bolivia, while regarding the child of an alien as an alien, gives him the right, on attaining his majority, of electing to be a citizen of the country in which he resides<sup>2</sup>. Russia makes nationality depend in principle on descent, but reserves a right of claiming Russian nationality to every one who has been born and educated on Russian territory. In all these

<sup>1</sup> The adoption of this principle was almost accidental. By the draft code it was proposed to be enacted, and the proposal was temporarily adopted, that 'tout individu né en France est Français.' It was urged against the article that a child might, e.g. be born during the passage of his parents through France, and would follow them out of it. What would attach him to France? Not feudality, for it did not exist on the territory of the Republic; nor intention, because the child could have none; nor the fact of residence, because he would not remain. (Conférence du Code Civil, i. 36-52.) These reasonings seem to have prevailed. In any case the article was changed. But M. Demolombe points out that after all 'une sorte de transaction entre le système Romain de la nationalité jure sanguinis et le système français de la nationalité jure soli' was effected by the provision which makes the naturalisation of the child of a foreigner born in France, who, during the year following the attainment of his majority, elects to be French, date back to the time of his birth. (Cours de Code Nap. liv. i. tit. i. chap. i. Nos. 146, 163.)

For the old law of France, see Pothier, Des Personnes et des Choses, partie i. tit. ii. sect. i; for that of England, Naturalisation Commission Report, Appendix. All 'children inheritors' born abroad were given the same benefits as like persons born in England by an Act of 25 Ed. III; but the children born abroad of all natural-born subjects were not reckoned as English subjects until after a statute of 7 Anne.

<sup>2</sup> In France, if the alien father was also born in France, the child is considered to be French, but a right is reserved to him of claiming the nationality of his father on attaining his majority.



PART II. cases the state regards as its subjects the children of subjects born abroad. In Italy the law is so far tinged with the ancient principle, that while all children of aliens may elect to be Italian citizens, they are such as of course if the father has been domiciled in the kingdom for ten years unless they declare their wish to be considered as strangers. In Europe, England, Portugal, Denmark and Holland adhere in principle to the old rule. In England and Portugal the child of an alien is English or Portuguese, but he may elect to recur to his nationality of parentage; in Denmark he is a Dane if he continues to live in the country; and he is Dutch in Holland if his parents are domiciled there. In the United States the children of foreigners born there are American citizens, while the children of American citizens born abroad are themselves citizens of the republic. The larger number of South American States regard as citizens all children of foreigners born within their territory. From the foregoing sketch of the various laws of nationality it may be concluded that the more important states recognise, with a very near approach to unanimity, that the child of a foreigner ought to be allowed to be himself a foreigner, unless he manifests a wish to assume or retain the nationality of the state in which he has been born. There can be no question that this principle corresponds better than any other with the needs of a time when a large floating population of aliens exists in most places, and when in every country many are to be found the permanence of whose establishment there depends upon the course taken by their private affairs from time to time. It is only to be wished that the rule in its simplest form were everywhere adopted<sup>1</sup>.

Illegitimate children.

§ 69. If children are illegitimate, their father being necessarily uncertain in law, the nationality of the mother is their only possible root of nationality where national character is derived from personal and not from local origin. Accord-

<sup>1</sup> Naturalisation Com. Rep., Append. ; Calvo, § 307 ; Bluntschli in Rev. de Droit International, ii. 107-9, 33 Vict. ch. 14.

ingly, it is almost everywhere the rule that they belong to the state of which the mother is a subject. English law appears indeed to form the only exception. By it illegitimate issue of Englishwomen abroad are considered to have the nationality of their place of birth, because it is by statute only that children born beyond the kingdom are admitted to the privilege of being English subjects, and no statute exists which applies to children produced out of wedlock. At the same time, as the old law of England imposing allegiance upon the issue of strangers in virtue of the soil has not been abrogated with respect to illegitimate children, the illegitimate children of foreign mothers, who have given birth to them in England, are considered to be English<sup>1</sup>.

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§ 70. Except in the United States the nationality of a wife is merged in that of her husband, so that when a woman marries a foreigner she loses her own nationality and acquires his, and a subsequent change of nationality on his part carries with it as of course a like change on her side. By the exceptional practice of the United States a native woman marrying a foreigner remains a subject of her state, though an alien woman marrying an American citizen becomes herself naturalised<sup>2</sup>.

Married  
women.

§ 71. It was observed in the last chapter that a state can only confer the quality of a citizen or subject in virtue of its sovereignty as within its own jurisdiction, and that the

Naturalisa-  
tion.

<sup>1</sup> Bluntschli, § 366. It is sometimes provided, e.g. in France and Italy, that when a natural child is recognised by his father, he follows the nationality of the latter. Demolombe, liv. i. tit. i. ch. i. No. 149; Mazzoni, Ist. di diritto Italiano, § 104.

<sup>2</sup> Until 1870 the same rule held in England. It was altered by the Naturalisation Act of that year. The application of the principle of the merger of the nationality of the wife in that of the husband is sometimes carried to excess. By the French law, for example, if a Frenchman makes a bigamous marriage with a foreigner in a foreign country, the woman with whom he goes through the ceremony of marriage acquires a French nationality, it being held that '*elle est devenue Française par le mariage, même frappé de nullité.*' Sirey, Les Codes Annotés, ed. 1855, iii. 18.

PART II. assertion of control, or the exercise of protection, over natural-  
CHAP. V. ised persons when outside its jurisdiction must be accounted  
— for either by a general consent on the part of states that the acquisition of a new nationality shall extinguish a previously existing one, or by the recognition of a right in every individual to assume the nationality of any state which may choose to receive him. It will be seen by analysing practice, which so far from being uniform is greatly confused, that no general understanding on the matter has as yet been arrived at. With regard to the question whether a right of changing their nationality is possessed by individuals; as individuals have no place in international law, any such right as that indicated, if binding upon states, must be so through the possession of a right by the individual as against his state which is prior to and above those possessed by the state as against its members. Whether or not such a right exists international law is obviously not competent to decide. It could only have adopted the right from without as being one of which the public law of all states had admitted the existence; and the absence of uniform custom shows that public law has not so pronounced as to enable international law to act upon its dictates. International law must either maintain the principle of the permanence of original ties, until they are broken with the consent of the state to which a person belongs who desires to be naturalised elsewhere, or it must recognise that the force of this principle has been destroyed by diversity of opinions and practice, and that each state is free to act as may seem best to it. There can be no doubt that the latter view is more in harmony with the facts of practice than the former. For the purposes of international law therefore the due relation of a naturalised person to the state which he has abandoned is outside the scope of principle; it is a question of convenience only; and it is either to be settled by an individual state in accordance with its own interests, or by treaty between states for the common interests of the contracting parties.

The practice of the more important states may be summarised as follows<sup>1</sup>:—

PART II.  
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That of England was based until 1870 upon the principles of the indelibility of natural allegiance and of liberty of emigration. Every one was free to leave his country; but whatever form he went through elsewhere, and whatever his intention to change his nationality, he still remained an Englishman in the eye of the law; wherever therefore English laws could run he had the privileges and was liable to the obligations imposed by them; if he returned to British territory he was not under the disabilities of an alien, and he was not entitled to the protection of his adopted country; if he was met with on the high seas in a foreign merchantman he could be taken out of it, the territoriality of such ships not being recognised by English law. On the other hand, so long as he stayed within foreign jurisdiction he was bound by his own professions; he had chosen to renounce his English character, and he could not demand the protection of the state towards which he acknowledged no duties. In the beginning of the present century this doctrine was rigidly enforced. Englishmen naturalised in the United States were impressed from on board American vessels for service in the English navy; and the government of the day entered upon the war of 1812 rather than mitigate the severity of its usages. In the peace which followed the treaties of Ghent and Vienna no occasion presented itself for giving effect upon the high seas to the doctrine maintained by Great Britain, and with the abandonment of impressment as a means of manning the navy the chief source of possible collision with other nations was removed, but successive English governments rejected the advances made by the United States for coming to a definite understanding on the question, and so late as 1842 Lord Ashburton, during

Practice  
of states  
with re-  
gard to  
subjects  
naturalised  
abroad.  
England.

<sup>1</sup> The facts bearing on this subject are collected in the Appendix to the Report of the Royal Commission on the Laws of Naturalisation and Allegiance, 1869.

PART II. his negotiations with Mr. Webster, put it aside as touching  
CHAP. V. a principle which could not be subjected to discussion. In  
other applications the doctrine came more immediately within the scope of practice. In 1848, during the Irish disturbances of that year, an Irishman, naturalised in America, was arrested on suspicion of treason. Mr. Bancroft, the minister accredited by the United States to the Court of St. James, having remonstrated against the treatment of the arrested person as a subject of Great Britain, Lord Palmerston in his answer upheld the traditional view in precise and decided language. On a like occasion in 1866 Lord Clarendon declared that 'of course the point of allegiance could not be conceded.' But at both times proceedings were pushed as little as possible to extremes; the earliest opportunity was taken of setting arrested persons free on condition of their leaving the country; and the question was only twice fairly raised on applications by two naturalised persons for a mixed jury at their trial in 1867. Thus for more than half a century the assertion of the indelibility of allegiance was little else than nominal. It had become an anachronism, and its consistent practical assertion was impossible. In 1868 consequently a commission was appointed to report upon what alterations of the laws of naturalisation it might be expedient to make; and in 1870 an Act was passed providing that a British subject on becoming naturalised in a foreign state shall lose his British national character, unless he makes a declaration within two years stating his wish to remain a subject, in which case he is deemed to be such except within the state in which he is naturalised. The latter qualification is little more than a formal sanction given to the practice which had already been followed. In 1858 it was stated by Lord Malmesbury, with reference to the children of British subjects born in the Argentine Confederation, who by the law of the Confederation were regarded as its subjects, that their quality of British subjects in England did not prevent them from being treated as subjects in the Confederation; and during

the Civil War in the United States the English government refused to protect naturalised persons, their minor children although born in England, and persons who though not formally naturalised had exercised privileges reserved to citizens of the United States<sup>1</sup>.

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In the United States a certain confusion exists, the policy of the country having varied at different times, and the opinions entertained in the courts not being perfectly identical with those which have inspired political action. In the controversies which took place between the United States and England in the opening years of the century the government of the former country contended that it had a right to protect persons who had been received as citizens by naturalisation, notwithstanding that domestic regulations of their state might forbid renunciation of allegiance or might subject it to restrictions, and broadly declared 'expatriation' to be 'a natural right.' Mr. Justice Story, on the other hand, laid down 'the general doctrine' to be 'that no persons can, by any act of their own, without the consent of the government, put off their allegiance and become aliens;' Kent adhered to the same opinion; and in an exhaustive review of the practice of the courts of the United States made by Mr. Cushing in 1856 it is remarked that on the 'many occasions when the question presented itself, not one of the judges of the Supreme Court has affirmed, while others have emphatically denied, the unlimited right of expatriation from the United States.' Of these inconsistent views the influence of the latter seems to have predominated during the greater part of the time which has elapsed since the war of 1812. In 1840 a Prussian naturalised in the United States, who had been required on returning to his country to undergo

United  
States.

<sup>1</sup> Naturalisation Commission Report, Appendix, p. 31-48; Naturalisation Act, 1870, 33 Vict. ch. 14. In consequence of claims for protection having been made by persons naturalised in England it has been the practice since 1851 to insert a claim in naturalisation certificates excepting from the rights granted any 'rights and capacities of a natural-born British subject out of and beyond the dominions of the British crown.'

PART II. military service, and who had applied for protection to  
CHAP. V. Mr. Wheaton, then American minister at Berlin, was in-  
formed by the latter that 'had you remained in the United States or visited any other foreign country except Prussia on your lawful business, you would have been protected by the American authorities at home and abroad in the enjoyment of all your rights and privileges as a naturalised citizen of the United States. But having returned to the country of your birth, your native domicil and natural character revert, so long as you remain in the Prussian dominions, and you are bound in all respects to obey the laws exactly as if you had never emigrated.' In several subsequent cases of the like kind the same line of conduct was pursued, and in 1853 the then minister at Berlin was instructed that 'the doctrine of inalienable allegiance is no doubt attended with great practical difficulties. It has been affirmed by the Supreme Court of the United States, and by more than one of the State Courts ; but the naturalisation laws of the United States certainly assume that a person can by his own acts divest himself of the allegiance under which he was born and contract a new allegiance to a foreign power. But until this new allegiance is contracted he must be considered as bound by his allegiance to the government under which he was born and subject to its laws ; and this undoubted principle seems to have its direct application in the present cases. . . . If then a Prussian subject, born and living under this state of law of military service, chooses to emigrate to a foreign country without obtaining the "certificate" which alone can discharge him from the obligation of military service, he does so at his own risk ;' and if such a person after being naturalised in the United States 'goes back to Prussia for any purposes whatever, it is not competent for the United States to protect him from the operation of the Prussian law.' Virtually, these instructions surrendered the right of expatriation. Verbally, no doubt, it is asserted ; but a right of expatriation at the will of the individual ceases to exist when

it is so subordinated to the duty of fulfilling conditions, to be dictated by the state from which the individual desires to separate, that non-fulfilment of them nullifies the effect of naturalisation as between him and it. A few years later American policy underwent another change. In 1859, questions having arisen between the United States and Prussia with reference to the conscription laws, Mr. Cass wrote that 'the moment a foreigner becomes naturalised his allegiance to his native country is severed for ever. He experiences a new political birth. A broad and impassable line separates him from his native country. . . . Should he return to his native country he returns as an American citizen, and in no other character.' From that time onwards the successive governments of the United States have shown a disposition to carry the right of expatriation to the furthest practicable point. Its acceptance was continually urged upon Prussia in the further negotiations which took place with that power; it was asserted in the correspondence between the United States and England; and in 1868 an act passed both houses of Congress affirming that 'the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness,' and enacting that 'all naturalised citizens of the United States while in foreign states shall be entitled to and shall receive from their government the same protection of persons and property that is accorded to native born citizens in like situation and circumstances<sup>1</sup>.'

The laws of Prussia regard the state as possessing the right of imposing conditions upon expatriation, and consequently of refusing it unless these conditions are satisfied. By the regulations in force no person lying under any liability to military service can leave the kingdom without permission, and any one doing so is punished on his return with fine or

<sup>1</sup> Naturalisation Commission Report, 52-4 and 82. Story's and Kent's expressions of opinion may also be referred to in *Shanks v. Dupont*, Peters' Supreme Court Cases, iii. 246, and Commentaries, ii. 49.



**PART II.** imprisonment. Persons naturalised in the United States are  
**CHAP. V.** excepted from the operation of these regulations by the treaty

of 1868 between that country and the North German Confederation, which provides that a naturalised person can only be tried on returning to his country of origin for acts done before emigration, and thus excludes punishment for the act of emigration without consent of the state or in avoidance of its regulations <sup>1</sup>.

**France.** In France the quality of a Frenchman is lost by naturalisation abroad, but the naturalised person is punishable by death if he bears arms against his former country.

**Italy.** In Italy naturalisation in a foreign country carries with it loss of citizenship, but does not exonerate from the obligations of military service, nor from the penalty inflicted on any one who bears arms against his native country.

**Spain.** In Spain the law simply provides for loss of original nationality upon the acquisition of a new national character <sup>2</sup>.

**Austria.** In Austria emigration is not permitted without consent of the authorities; persons emigrating or taking up a foreign national character with consent become foreigners; persons doing so without consent equally lose their Austrian nationality, and are punished by sequestration of any property which they may possess within the empire.

**Russia.** The practice of Russia is not clear. There appears to be reason to suppose that a Pole naturalised in America was seized and forced to serve in the army in 1866; but in the same year another Pole was deprived of the rights of Russian citizenship and banished for ever for being naturalised in the United States without leave of the emperor. It is at any rate fair to conclude that the acquisition of foreign nationality

<sup>1</sup> De Martens, *Nouv. Rec. Gén.* xix. 78.

<sup>2</sup> Dana (Note to Wheaton, No. 49) says that 'Spain contends for an unlimited right over returned subjects for subsequent as well as past obligations.' He does not however mention his authority, and the statement hardly seems to be consonant with the text of the Spanish law.

is not regarded as *ipso facto* releasing a subject from his allegiance<sup>1</sup>.

PART II.  
CHAP. V.

Turning from the views taken by states as to the position of their own subjects when naturalised abroad, to their practice with respect to the protection of foreigners who have been received into their own community; the naturalisation law of Russia is found to place strangers admitted to Russian nationality 'on a perfect equality in respect to their rights with born Russians.' In Spain it might be supposed, by the analogy of the law with respect to Spaniards naturalised abroad, that a complete transfer to the new nationality is understood to take place, especially as the language of the article of the Constitution dealing with the subject is very broad; 'aliens,' it says, 'who have obtained certificates of naturalisation are Spaniards;' but it seems nevertheless that they are not held to be freed from the obligations imposed by their nationality of origin, unless their naturalisation has taken place with the permission of their state. In France it appears from a correspondence which took place in 1848 between M. Crémieux, then Minister of Justice, and Lord Brougham that the acquisition of French nationality is considered to involve of necessity the severance of all bonds between the naturalised person and his former state, and his absorption for all purposes into the French nation. In the other states above mentioned it does not appear to have been distinctly laid down as a general principle, or to have been shown by state action in particular instances, whether a foreigner, on receiving naturalisation, would be regarded as having acquired a right to protection as against his former country. Judging from the analogy of their laws with respect to their own natural-born subjects, it may however be presumed that in Germany and Italy the right of a state would be recognised to look upon naturalisation of its subjects as conferring the quality of foreigner upon the persons naturalised to such extent only as it might itself choose. In each

Practice of  
states with  
regard to  
foreigners  
naturalised  
by them.

<sup>1</sup> Naturalisation Commission Report, Appendix.

PART II. of these countries a subject naturalised abroad may be held  
 CHAP. V. responsible upon his return within their jurisdiction for con-  
 — trventions of municipal law committed after or simul-  
 taneously with naturalisation. That the number of punish-  
 able acts is small is of course unimportant. The fact that  
 any acts done after or simultaneously with naturalisation are  
 punishable affirms the principle that naturalisation does not  
 of itself destroy the authority of the original sovereign<sup>1</sup>.  
 In the case of Austria no inference can probably be safely  
 drawn either from the law affecting its own subjects or  
 that regulating the conditions of the naturalisation of  
 foreigners<sup>2</sup>.

Conclu-  
 sions.

It may be taken that the practice of the foregoing states  
 gives a fair impression of practice as a whole; and it may  
 be assumed that when a state makes the recognition of a  
 change of nationality by a subject dependent on his fulfil-  
 ment of certain conditions determined by itself, or when it  
 concedes a right of expatriation by express law, it in effect  
 affirms the doctrine of an allegiance indissoluble except by  
 consent of the state<sup>3</sup>. Such being the case, the doctrine in

<sup>1</sup> Where naturalisation is used to escape from liability to *future* military service the offence is only committed by the completion of the act of naturalisation; but the latter, if it be effective to substitute an entirely new nationality for that previously existing, must obliterate the criminal character of the act at the moment of its performance.

<sup>2</sup> Naturalisation Commission Report, Appendix; Calvo, § 322; Lawrence, Commentaire, iii. 299.

<sup>3</sup> Notwithstanding that M. Bluntschli holds the liberty of emigration not to be absolute, and to be subject to 'l'accomplissement préalable des obligations indispensables envers l'état,' such as military service, he thinks that 'contrairement à l'ancienne opinion qui considérait le sujet comme perpétuellement obligé envers son prince ou envers son pays, et qui ne lui permettait pas de briser ce lien de son autorité privée, on en est arrivé peu à peu à reconnaître le principe de la liberté d'émigration. Nul état civilisé ne pourra à la longue se soustraire à l'application de cette nouvelle et libérale maxime.' Rev. de Droit Int. ii. 115-6. It is difficult to understand how liberty of emigration as a principle can be consistent with a regulatory power in the state. Who but the state is to define the 'obligations indispensables' which must be satisfied? And if the state may draw up a list of these obligations, and may insert among them obligations stretching over a lifetime, liberty of emigration becomes illusory. Incompatible principles cannot occupy an equal position. In the long run one

question, disguised though it may be, is still the groundwork of a vastly preponderant custom. It may be hoped, both for reasons of theory and convenience, that it will continue to be so. An absolute right of expatriation involves the anarchical principle that an individual, as such, has other rights as against his state in things connected with the organisation of the state society than the right not to be dealt with arbitrarily, or dissimilarly from others circumstanced like himself, which is implied in the conception of a duly ordered political community; it supposes that the individual will is not necessarily subordinated to the common will in matters of general concernment. As a question of convenience, the objections to admitting a right of expatriation are fully as strong. The right, if it exists, is absolute; it can therefore only be curtailed with the consent of each individual. But if the doctrine of permanent allegiance be admitted, there is nothing to prevent the state from tempering its application to any extent that may be proper. Action upon it in its crude form is obviously incompatible with the needs of modern life; but it is consistent with any terms of international agreement which the respective interests of contracting parties may demand, and if recognised in principle and taken as an interim rule where special agreements have not been made, it would do away with practical inconveniences which frequently occur, and which as between certain countries might in some circumstances give rise to international dangers. It would be a distinct gain if it were universally acknowledged that it is the right of every state to lay down under what conditions its subjects may escape from their nationality of origin, and that the acquisition of a foreign nationality must not be considered good by the state granting it as against the 'country of origin, unless the conditions have been satisfied. It may at

must yield to the other, and it is evident, as must inevitably be the case, that the principle of free emigration yields with M. Bluntschli to that of the supremacy of the state.

PART II. the present day be reasonably expected that the good sense  
 CHAP. V. of states will soon do away with such rules as are either  
 vexatious or unnecessary for the safeguard of the national  
 welfare<sup>1</sup>.

Impro-  
 priety, on  
 the part of  
 a state  
 granting  
 nationality,  
 of making  
 the con-  
 ditions of  
 acquisition  
 too easy.

In the meantime, and until an agreement is come to upon the question of principle, it may be said that though a state has in strictness full right to admit foreigners to membership, and to protect them as members, it is scarcely consistent with the comity which ought to exist between nations to render so easy the acquisition of a national character, which may be used against the mother state, as to make the state admitting the foreigner a sort of accomplice in an avoidance by him of obligations due to his original country. When naturalisation laws are so lax as to lend themselves to an avoidance of reasonable obligations, the state possessing them can have no right to complain, if exceptional measures, such as expulsion from the mother country, are resorted to at the expense of its adopted subjects. After the annexation of Frankfort to Prussia, a number of young men of that town, taking advantage of the looseness of Swiss naturalisation laws, obtained naturalisation in Switzerland in order to avoid the incidence of the conscription laws, and returned to Frankfort intending to live there as Swiss subjects. The Prussian government expelled them, and the Swiss government admitted that its conduct was fully justified.

§ 72. Questions have sometimes occurred, both with regard to the privileges and the responsibilities of the individual, as to the effect of domicil or of a partial completion of formalities required for the acquisition of nationality, and as to that of doing acts the right to perform which is reserved as a privilege to the citizens or subjects of a state.

A question of the former kind, which attracted much attention at the time, was given rise to by Martin Koszta, an Hungarian insurgent of 1848-9. The merits of the case as a whole were somewhat complicated; but the facts bearing

<sup>1</sup> For the naturalisation laws of various states see Appendix iv.

on the present point were few and simple. At the end of the rebellion Koszta escaped to Turkey, whence he ultimately went to the United States. He stayed in the latter country less than two years, and then returned to Turkey upon business, after however having made a statutory declaration of his intention to become an American citizen. While at Smyrna he was arrested by Austrian authorities claiming to have the right to do so under the capitulations between their state and Turkey, and he was put on board an Austrian war brig, the Hussar, for conveyance to Triest. Before the vessel got under weigh however an American frigate arrived, and threatened to sink the Hussar unless Koszta was at once delivered up. As the Austrian commander refused, and as from the position of the ships a conflict would have endangered the town, the matter was momentarily settled by the delivery of the prisoner to the French Consul to be kept until the two governments concerned should have an opportunity of arriving at a decision. In the end the affair was compromised by Austria consenting to Koszta being shipped off to the United States, the right to proceed against him in case he returned to Turkey being reserved. By the naturalisation law of the United States the conditions requiring to be fulfilled before admission to citizenship could take place were a residence of five years in the country, and a declaration of intention to become a citizen made before a court of justice at least three years prior to application for admission. It could not therefore be pretended, and was not pretended, that Koszta was naturalised. The original action of the representatives of the United States seems however to have been suggested by the impression that a right to protection was acquired by the declaration of intention to be naturalised. The government took up other ground. 'It is a maxim of International law,' wrote Mr. Marcy, 'that domicil confers a national character; it does not allow any one who has a domicil to decline the national character thus conferred; it forces it upon him often very much against his will, and

PART II.

CHAP. V.  

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PART II. to his great detriment. International law looks only to the  
 CHAP. V. national character in determining what country has the right  
 — to protect. . . . As the national character, according to the  
 law of nations, depends upon the domicil, it remains as long  
 as the domicil is retained, and is changed with it. Koszta  
 was therefore invested with the nationality of an American  
 citizen at Smyrna, if he in contemplation of law had a domicil  
 in the United States<sup>1</sup>. Domicil no doubt imparts national  
 character for certain purposes ; but those purposes, as far as  
 they have to do with public international law, are connected  
 with the rules of war alone, and Mr. Marcy's contention was  
 wholly destitute of legal foundation. The ideas to which he  
 gave expression were not however peculiar to himself ; they  
 seem to have been commonly held in America, and the action  
 of the Confederate States with reference to conscription in  
 1862 rendered it necessary for the English government to  
 urge the rudimentary doctrine, 'That a domicil established  
 by length of residence only, without naturalisation or any  
 other formal act whereby the domiciled person has, so to  
 speak, incorporated himself into the state in which he resides,

<sup>1</sup> Mr. Marcy's doctrine was strangely inconsistent with the law of the United States at the period when he wrote. It was no doubt open to him to argue that a person might be entitled to the protection of the United States as a member of the state community without being in possession of those privileges of citizenship which naturalisation would give him, because under the constitution of the Union several classes of persons are in that position ; as for example Indians and the inhabitants of conquered country, the latter of whom, as was the case with the inhabitants of California after its conquest from Mexico, are aliens until they are admitted to citizenship by an act of Congress, but are nevertheless 'subjects' as between the United States and foreign powers (Halleck, ii. 456). But at the time in question persons who had declared their intention of becoming citizens were incapable of receiving United States passports, and consequently could not have been regarded as subjects. Since then, by an act of 1863, such of them as were liable to military service were rendered capable of receiving passports ; but in 1866 this act was repealed and it was provided that for the future passports should be issued to citizens only (Lawrence, Commentaire, iii. 193). Dr. Woolsey (§ 81, 3) seems to think that the merits of the case are affected by the fact that Koszta was in possession of a passport given to him by the American Consul at Smyrna ; but a passport granted in contravention of the laws of the United States was obviously a mere piece of waste paper.

does not "for the time convert him into a subject of the domicile in all respects save the allegiance he owes his native sovereign." Such a domiciled person is not a *civis*, but a temporary subject, *subditus temporarius*, of the state in which he is resident.' Later, when the Northern States were in serious want of men in 1863, an act was passed subjecting foreigners to military service who had expressed their intention to become citizens. On this occasion Lord Russell, while apparently admitting that the scope of the act was not beyond the legitimate powers of a state over foreigners, represented that persons affected by it ought to be allowed a reasonable time to withdraw from the country. A proclamation was consequently issued giving sixty-five days for the departure of intending citizens. In stating in the preamble that its issue was caused by a claim made on behalf of such persons to the effect that under the law of nations they retained the right of renouncing their purpose of becoming citizens the government of the United States went further than it was asked; and in giving what was demanded not as a concession but as a right, abandoned all assertion of right to control persons as being citizens whose naturalisation is incomplete, and by implication abandoned also the assertion of a right to protect them.

The position of persons exercising rights reserved to subjects is different. Whether or not they have been allowed to exercise them under a misapprehension as to their being subjects is immaterial. They have shown by their own acts that they wish to share in privileges understood to belong to subjects only, and they cannot afterwards turn round and repudiate their liability to correlative responsibilities. During the American civil war the English government very properly refused to interfere on behalf of British subjects who had placed themselves in this situation. It does not follow that such persons are in a better position than ordinary foreigners as between third states and the state within which they have arrogated to themselves the rights of subjects, and the burdens



PART II. of which they must consequently bear. Third states, and the  
 CHAP. V. state of origin when it acknowledges naturalisation as changing  
 nationality, can only look to the fact that the naturalisation  
 laws of the state naturalising have or have not been fully  
 complied with. Until these laws are satisfied the state into  
 which a person has immigrated can have no right of pro-  
 tecting him<sup>1</sup>.

The ques-  
 tions aris-  
 ing out  
 of sove-  
 reignty in  
 relation to  
 subjects  
 with which  
 interna-  
 tional law  
 deals.

§ 73. When once the persons who are indisputably the  
 subjects of a state, or whom it may regard as such, are  
 ascertained, no question having special reference to sove-  
 reignty in its relation to the subjects of the state remain to  
 be considered. International law has nothing to do with  
 the authority exercised over a subject within the jurisdiction  
 of a state, whether such jurisdiction be territorial or is that  
 which is possessed in unappropriated places. Within the  
 jurisdiction of a foreign state no authority exists, except in so  
 far as those immunities from jurisdiction extend, which are  
 discussed elsewhere<sup>2</sup>, as having more immediate connection  
 with sovereignty in its relation to territory; the state may  
 issue any commands not incompatible with its duties to the  
 foreign state, but it cannot of course enforce them except by  
 the sanctions of municipal law, and consequently in places  
 within its own jurisdiction. Finally, the right of protecting  
 subjects abroad falls under the head of self-preservation<sup>3</sup>.

Persons  
 destitute  
 of nation-  
 ality, or of  
 uncertain  
 nationality.

§ 74. Where, as is the case for example in Austria, any one  
 emigrating without permission of the state loses his nationality,  
 it is possible for persons destitute of national character to  
 be sent out upon the world. They lose their nationality of  
 origin by the act of emigrating, and are consequently without  
 nationality until or unless they are formally received into  
 another state community. It is evident that the existence  
 of such a class would be embarrassing; and it appears that

<sup>1</sup> Report of the Naturalisation Laws Commission, Appendix, 16, 42-5, 56;  
 De Martens, Causes Cél. v. 583.

<sup>2</sup> See § 49-56.

<sup>3</sup> See § 87.

much inconvenience was in fact caused until lately both in Germany and Switzerland by the presence of individuals who either had no nationality, or whose nationality it was impossible to determine. It was ultimately settled by convention as between the Swiss Cantons and as between the German states that any one found to be in either of these positions should be considered to be a subject of the state in which he was living, provided that he had resided there five years since attaining his majority, or had stayed there six weeks after his marriage, or finally had married there<sup>1</sup>. It might be useful to adopt, as an international rule, a practice of ascribing a nationality of domicile to persons without nationality or of uncertain national character.

<sup>1</sup> Bluntschli, § 369.

## CHAPTER VI.

### JURISDICTION IN PLACES NOT WITHIN THE TERRITORY OF ANY STATE.

PART II.  
CHAP. VI.

General  
view of  
the juris-  
diction ex-  
ercised by  
states in  
places not  
within the  
territory of  
any state.

§ 75. ON the unappropriated sea and on land not belonging to any community so far possessed of civilisation that its territorial jurisdiction can be recognised, it is evident that, as between equal and independent powers, unless complete lawlessness is to be permitted to exist, jurisdiction must be exercised either exclusively by each state over persons and property belonging to it, or concurrently with the other members of the body of states over all persons and property, to whatever country they may belong. The former of these alternatives is that which is most in consonance with principle. It has been seen that the state retains control over the members of the state community when beyond its territorial jurisdiction in so far as such control can be exercised without derogating from the territorial rights of foreign states, so that with respect to individuals there is always a state in a position to assert a claim to jurisdiction higher than any which can be put forward by other states; and although jurisdiction cannot be founded on non-territorial property so as to exclude or diminish territorial jurisdiction, the possession of an object as property at least forms a reasonable ground for the attribution of exclusive control to its owner when no equal or superior right of control can be shown by another. Concurrent jurisdiction could therefore only be justified by a greater universal convenience than several jurisdiction can

secure, and in most cases, so far from universal convenience being promoted, it would be distinctly interfered with, by the admission of a common right of jurisdiction on the part of all nations. It is consequently the settled usage that as a general rule persons belonging to a state community, when in places not within the territorial jurisdiction of any power, are in the same legal position as if on the soil of their own state, and that, also as a general rule, property belonging to a state or its subjects, while evidently in the possession of its owners, cannot be subjected to foreign jurisdiction.

PART II.  
CHAP. VI.  
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For special reasons however exceptions are sometimes made to this usage. It has been already pointed out that in time of war a neutral state frees itself from responsibility for acts done outside its frontier by its subjects, when they are not employed as its own agents, by allowing a belligerent to exercise so much jurisdiction over them and their property as is necessary for the protection of his right to attack an enemy in the various ways sanctioned by the customs of war. In such cases the right of jurisdiction is wholly abandoned within defined limits. Concurrent jurisdiction, again, is conceded by a country to a specific foreign state when subjects of the former take passage or service on board the vessels of the latter, and to all foreign states when the crew of a ship belonging to it is guilty of certain acts which go by the name of piracy. Finally, when persons on board a ship lying in or passing through foreign waters commit acts forbidden by the territorial law the local authorities may pursue the offending vessel into the open sea in order to vindicate their jurisdiction.

§ 76. It is unquestioned that in a general way a state has the rights and the responsibilities of jurisdiction over ships belonging to it while they are upon the open sea, but a difference of opinion exists as to the theoretical ground upon which the jurisdiction of the state ought to be placed, and this is so wide-reaching and important in its effects as to make it worth while to examine carefully into the reasonableness of

Theory of  
the terri-  
toriality of  
vessels.

PART II. the doctrines on either side and into the amount of authority  
 CHAP. VI. by which they are respectively supported.

According to some writers ships are floating portions of the country upon which they depend, or, as the doctrine is sometimes expressed, they are a 'continuation or prolongation' of territory. According to others the jurisdiction possessed by a state over its ships upon the ocean arises simply from the fact that no local jurisdiction exists there; it is necessary for many purposes that jurisdiction over a vessel shall be vested in a specific state; it is natural to concede a right of jurisdiction to the owner of property until his claim as such is opposed by a superior title on the part of some one else; and all states being equally destitute of local rights upon the ocean, no right to jurisdiction over a vessel can, within the range of the purposes contemplated, be superior to that of the state owning it. According to this theory it does not follow that there are no rights other than those of the owner which are ever able to assert themselves. Claims springing from property may, for example, be confronted with claims based on the rights of self-preservation. And as claims which are ultimately founded on the latter right are actually made by belligerents, the theory has at least the advantage of fitting in better with existing practice than the competing doctrine. If the latter is authoritative, usages such as that of the capture of neutral vessels for contraband trade, instead of being sanctioned under the general principles of international law, would become exceptional and be thrown upon their defence. The legal position of merchant ships in territorial waters would also be affected, and it would be necessary upon that point to admit and to go beyond the views of the French school which have already been stated and rejected.

Its history. It does not appear that the doctrine of the territoriality of vessels can be traced further back than to the 'Exposition des Motifs' put forth in 1752 by the Prussian government in justification of its behaviour in confiscating the funds

payable to its English creditors in respect of the Silesian Loan. In that repertory of bad law it is said that 'the Prussian vessels, although laden with property belonging to the enemies of England, were a neutral place, whence it follows that it is exactly the same thing to have taken such property out of the said vessels as to have taken it upon neutral territory<sup>1</sup>.' The assertion, of which the object was to produce the impression that the English, in acting upon an ordinary usage, had been guilty of illegal conduct, was supported by no reasoning. In its origin therefore the doctrine had just so much authority as belongs to a legal proposition laid down by an advocate whose law is notoriously bad. A few years later the idea reappears in Vattel, but he uses it only incidentally to explain a particular custom, and evidently without adequate consideration of its scope and bearings. Children born at sea, he says, if born in a vessel belonging to the state of which their parents are subjects, 'may be considered to be born within the territory, for it is natural to regard the ships of the nation as parts of its territory, especially while they navigate unappropriated waters, since the state preserves its jurisdiction over them<sup>2</sup>.' With Hübner the doctrine holds a more conspicuous position. A proof was required that enemy's goods ought not to be captured on board neutral vessels. Let the territoriality of merchant ships be granted and the proof was found. 'It is universally agreed that a belligerent cannot attack his enemy in a neutral place, nor capture his property there. Neutral vessels are unquestionably neutral places. Consequently when they are laden with enemy's goods a belligerent has no right to molest them because of their cargoes<sup>3</sup>.' The question is simply begged. The territoriality of a vessel is a metaphorical conception; and before a metaphor can be employed as an operative principle of law, it must be proved to have been so adopted into law as to render its use

<sup>1</sup> De Martens, *Causes Cél.* ii. 117.

<sup>2</sup> Liv. i. ch. xix. § 216.

<sup>3</sup> De la Saisie des Batimens Neutres, tom. i. p<sup>te</sup> ii. ch. ii. § 6.

PART II. necessary, or at least reasonable. It was impossible for  
 CHAP. VI. Hübner to show this. It would have been idle for him to  
 appeal to the extritoriality of sovereigns, ambassadors, or  
 ships of war, as one generally accepted, even if it had then  
 been in fact more fully accepted with respect to ships of war  
 than it actually was. Enough has been said in stating the  
 respective characteristics of ships of war and commerce, and  
 the reasons for which privileges are conceded to the former  
 within the territory of foreign countries, and even in giving  
 the arguments by which the French view as to the position  
 of merchant vessels in foreign ports is supported, to show that  
 the analogy between the two classes of vessels is not close  
 enough to require that a mode of treating the one shall be  
 extended to the other at the cost of a reversal of usage. And  
 usage, so far as merchant vessels was concerned, was wholly  
 inconsistent with the doctrine of territoriality.

Notwithstanding that the theory was thus destitute of  
 foundation, it has always had a certain number of adherents,  
 it is probably adopted definitively by several states, it is pro-  
 fessed by living or recent writers of current authority, and  
 its influence is no doubt felt in much that is written against  
 the established customs of maritime war.

Its inad-  
 missibility.

The modern advocates of the doctrine are somewhat too apt  
 to affirm that 'international law has long admitted the  
 principle that a ship leaves the country to which it belongs  
 as a floating portion of its territory,' without adducing any  
 proof of its admission. If they endeavour to prove the cor-  
 rectness of their view, they say with Massé that, as sovereignty  
 cannot be established over the seas, jurisdiction cannot be  
 exercised there except over property by the state owning it,  
 and that acts done on the high seas under the flag of a state  
 are reputed to be done on the soil of that state<sup>1</sup>. Both

<sup>1</sup> Bluntschli, § 317; Massé, liv. ii. tit. i. ch. ii. sect. ii. § 10, art. i. See also  
 Heffter, § 78; Hautefeuille, *Droits et Devoirs des Neutres*, tit. vi. ch. i. sect.  
 1; Negrin, 95.

Ortolan (*Dip. de la Mer*, liv. ii. ch. x) appears to hold that merchant vessels

statements are inconsistent with the facts. They are only true of cases in which no other state than that to which a vessel belongs has an interest in also exercising jurisdiction; they are true of the effect of births, wills, &c., but they are not true, for example, when a vessel carries good contraband of war, the seizure of which upon neutral territory would be a gross violation of sovereignty.

International law indeed as laid down by these writers themselves is inconsistent with the principle which they uphold. It is admitted by the most thorough-going assertors of the territoriality of merchant vessels that so soon as the latter enter the ports of a foreign state they become subject to the local jurisdiction on all points in which the interests of the country are touched; that when a vessel or some one

are territorial upon the ocean, and lose their territorial character on entering territorial waters.

The territoriality of merchant vessels is not admitted by Lampredi (Com. dei Pop. Neut. pt. i. § xi), Wheaton (Elem. pt. ii. ch. ii. § 10), Manning (275, Abdy's ed.), Riquelme (i. 222), Twiss (i. § 159), Fiore (pt. ii. ch. v), Harcourt (Letters of Historicus, No. x).

The doctrine of the non-territoriality of merchant vessels has always been strongly, and often too strongly held, by English governments. Its position in their view at the beginning of the present century was expressed without exaggeration by Lord Stowell when he said that 'the great and fundamental principle of British maritime jurisprudence is, that ships upon the high seas compose no part of the territory of a state. The surrender of this principle would be a virtual surrender of the belligerent rights of this country.' (Sir W. Scott, Report in Impressment Papers, 1804, quoted in Append. to Report of Naturalisation Commission, p. 32.) The doctrine was not only maintained to the full, but in dealing with impressment it was pushed beyond its natural limits, and was converted into an assertion of concurrent jurisdiction, not by way of a customary exception, but as a matter of principle independently of general consent. Of course the conduct of England at the period in question had much to do with the vivacity which has been displayed by the fiction with which her doctrine was incompatible; and it tended to drive the United States into the opposite extreme. By the latter power in fact the territoriality of the merchant vessel has been distinctly asserted. Mr. Webster writing to Lord Ashburton (Aug. 8, 1842) with reference to impressment says, 'Every merchant vessel on the seas is rightfully considered as part of the territory of the country to which it belongs. The entry therefore into such vessel, being neutral, by a belligerent, is an act of force, and is *prima facie* a wrong, a trespass, which can be justified only when done for some purpose allowed to form a sufficient justification by the law of nations.' *Ib.* 60.



PART II. on board has infringed the local laws she can be pursued into  
 CHAP. VI. the open seas, and can be brought back, or the culprit can  
 — be arrested there; that in time of war a merchant ship can  
 be seized and condemned for carriage of contraband or breach  
 of blockade. Now it was long ago pointed out that if a  
 merchant vessel is part of the territory of her state she must  
 always be part of it<sup>1</sup>. The fiction is meaningless unless it  
 conveys that a merchant ship is clothed with the characteristic  
 attributes of territory, and among these are inviolability at  
 all times and under all circumstances short of a pressing  
 necessity of self-preservation on the part of another power  
 than that to which the territory belongs, and exclusiveness of  
 jurisdiction except in so far as it is abated by the custom of  
 extritoriality, which of course cannot be brought into use as  
 against a ship. This however the fiction does not convey.  
 Under the confessed practice of nations the alleged territorial  
 character disappears whenever foreign states have strong  
 motives for ignoring it. It cannot be seriously argued that a  
 new and arbitrary principle has been admitted into law so  
 long as a large part of universally accepted practice is in-  
 compatible with it, and while at the same time its legal  
 character is denied both by important states and by writers  
 of weight.

Limits of  
 the juris-  
 diction of  
 a state  
 over its  
 merchant  
 vessels in  
 non-terri-  
 torial  
 waters.

§ 77. Putting aside the fiction of territoriality as untenable, it may be taken for granted that the jurisdiction exercised by a state over its merchant vessels upon the ocean is conceded to it in virtue of its ownership of them as property in a place where no local jurisdiction exists; this being a reasonable theory, and the only one which enters into competition with the doctrine of territoriality. It only remains therefore to see what are the limits of the jurisdiction thus possessed. As might be expected, it is sufficient to provide for the good order of the seas, and excludes foreign jurisdiction until grave reason can be shown for its exercise. Its extent may be defined as follows. A state has—

<sup>1</sup> Manning, 276.

1. Administrative and criminal jurisdiction so as to bring all acts cognisable under these heads, whether done by subjects or foreigners, under the disciplinary authority established in virtue of state control on board the ship and under the authority of the state tribunals.

2. Full civil jurisdiction over subjects on board, and civil jurisdiction over foreigners to the extent and for the purposes that it is exercised over them on the soil of the state, unless partial exemption is given to them when on board ship by the municipal law of the state.

3. Protective jurisdiction to the extent of guarding the vessel against interference of any kind on the part of other powers, unless she commits acts of hostility against them, or does certain acts during war between two or more of them which belligerents are permitted to restrain<sup>1</sup>, or finally, escapes into non-territorial waters after committing, or after some one on board has committed, an infraction of the law of a foreign country within the territory of the latter.

A state is responsible for all acts of hostility against another state done on the ocean by a merchant vessel belonging to it, and it is bound to offer the means of obtaining redress in its courts for wrongful acts committed against foreign individuals by her or by persons on board her. It is not responsible for those acts above mentioned which belligerents are permitted to restrain, or for acts, to be defined presently, which constitute piracy.

§ 78. With respect to ships of war and other public ships little need be said. The fiction of territoriality is useless, but it is harmless; because it cannot cause larger privileges to be attributed to such vessels than they are acknowledged for other reasons to possess. They represent the sovereignty and independence of their state more fully than anything else can represent it on the ocean; they can only be met by their equals there; and equals cannot exercise jurisdiction over

Jurisdiction over public vessels.

<sup>1</sup> See Pt. iv. chaps. v, vi, vii.

**PART II.** equals. The jurisdiction of their own state over them is  
**CHAP. VI.** therefore exclusive under all circumstances, and any act of  
 interference with them on the part of a foreign state is an  
 act of war.

Jurisdic-  
 tion of a  
 state over  
 foreigners  
 in its ships.

§ 79. It follows from the amount of jurisdiction possessed by a country over its vessels upon the ocean that a state concedes to a foreign power concurrent jurisdiction over its subjects serving or taking passage in ships belonging to the latter. All acts done, or things occurring, on board have the same civil or criminal value relatively to the foreign state, and entail the same consequences, as if done within the territory of the latter. On the other hand, the state of which the subjects are on board a foreign ship may of course appreciate such acts or occurrences in whatever way it chooses, and may affix what consequences it likes to them, as within its own territory.

Pursuit of  
 a vessel  
 into non-  
 territorial  
 waters  
 for infrac-  
 tions of law  
 committed  
 in terri-  
 torial  
 waters.

§ 80. It has been mentioned that when a vessel, or some one on board her, while within foreign territory commits an infraction of its laws she may be pursued into the open seas, and there arrested. It must be added that this can only be done when the pursuit is commenced while the vessel is still within the territorial waters or has only just escaped from them<sup>1</sup>. The reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised. The restriction of the permission within the bounds stated may readily be explained by the abuses which would spring from a right to waylay and bring in ships at a subsequent time, when the identity of the vessel or of the persons on board might be doubtful.

Piracy.

§ 81. Pirates, according to Bynkershoek<sup>2</sup>, are persons who

<sup>1</sup> Bluntschli, § 342 ; Woolsey, § 54.

<sup>2</sup> Quæst. Jur. Pub. lib. i. cap. xvii.

depredate by sea or land without authority from a sovereign. The definition, like most other definitions of pirates and piracy, is at once too wide and too narrow to correspond exactly with the acts which are now held to be piratical, but it may serve as a starting-point by directing attention to the external characteristic by which, next to their violent nature, they are chiefly marked. Piracy includes acts differing much from each other in kind and in moral value; but one thing they all have in common; they are done under conditions which render it impossible or unfair to hold any state responsible for their commission. A pirate either belongs to no state or organised political society, or by the nature of his act he has shown his intention and his power to reject the authority of that to which he is properly subject. So long as acts of violence are done under the authority of the state, or in such way as not to involve its supersession, the state is responsible, and it alone exercises jurisdiction. If a commissioned vessel of war indulges in illegal acts, recourse can be had to its government for redress; if a sailor commits a murder on board a vessel the authority of the state to which it belongs is not displaced, and its laws are able to assert themselves; but if a body of men of uncertain origin seize upon a vessel and scour the ocean for plunder no one nation has more right of control over them, or more responsibility for their doings, than another, and if the crew of a ship takes possession of it after confining or murdering the captain, legitimate authority has disappeared for the moment, and it is uncertain for how long it may be kept out. Hence every nation may seize and punish a pirate, and hence, in the strong language of judges and writers whose minds have dwelt mainly upon piracy of a particular sort, he is reputed to be the enemy of the whole human race. ¶

When the distinctive mark of piracy is seen to be independence or rejection of state or other equivalent authority it becomes clear that definitions are inadequate which, as

**PART II.** frequently happens, embrace only depredations or acts of  
**CHAP. VI.** violence done *animo furandi*. If a vessel belonging to an  
 — extinguished state were to keep the seas after the national  
 identity had been wholly lost, and were to sink the vessels  
 and kill the subjects of the victorious state, the intention to  
 plunder would be absent, but the act at bottom would be the  
 same as one in which that intention was present. In both  
 cases the acts done would be acts of violence committed by  
 persons having no right to perform them without authority  
 from a politically organised society, but having no such  
 society behind them; and in both cases they would be acts  
 for which no remedy could be obtained except upon the  
 persons by whom they were done.

It may on the other hand be worth while to remark that a  
 satisfactory definition of piracy must expressly exclude all  
 acts by which the authority of the state or other political  
 society is not openly or by implication repudiated. Probably  
 it is never intended to convey anything else, but the language  
 of some writers is sufficiently loose to render it uncertain  
 whether cases even of common robbery, cognisable only by  
 the sovereign of the criminals, might not fall within the  
 scope of the words used.

It is generally said that one of the conditions of the  
 piratical character of an act is the absence of authority to  
 do it derived from any sovereign state. Different language  
 would no doubt have been employed if sufficient attention  
 had been earlier given to societies actually independent,  
 though not recognised as sovereign. Most acts which  
 become piratical through being done without due authority  
 are acts of war when done under the authority of a state;  
 and as societies to which belligerent rights have been granted  
 have equal rights with permanently established states for the  
 purposes of war, it need scarcely be said that all such acts  
 authorised by them are done under due authority. Whether  
 the same can be said of acts done under the authority of  
 politically organised societies which are not yet recognised as

belligerent may appear more open to argument, though the conclusion can hardly be different. Such societies being unknown to international law, they have no power to give a legal character to acts of any kind ; at first sight consequently acts of war done under their authority must seem to be at least technically piratical. But it is by the performance of such acts that independence is established and its existence proved ; when done with a certain amount of success they justify the concession of belligerent privileges ; when so done as to show that independence will be permanent they compel recognition as a state. It is impossible to pretend that acts which are done for the purpose of setting up a legal state of things, and which may in fact have already succeeded in setting it up, are piratical for want of an external recognition of their validity, when the grant of that recognition is properly dependent in the main upon the existence of such a condition of affairs as can only be produced by the very acts in question. It would be absurd to require a claimant to justify his claim by doing acts for which he may be hanged. Besides, though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private, as contrasted with public, ends. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a state. The man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular state. The only reason therefore for punishing him as a pirate is that an unrecognised political society cannot offer a sufficient guarantee that the agents employed by it will not make the warlike operations in which they are engaged a cloak for indiscriminate plunder and violence. The reason seems hardly adequate. It is enough that the power must always exist to treat them as pirates so soon as

PART II. they actually overstep the limits of political action. The  
 CHAP. VI. true view then would seem to be that acts which are allowed  
 in war, when authorised by a politically organised society,  
 are not piratical. Whether a particular society is or is not  
 politically organised is a question of fact which must be  
 decided upon the circumstances of the case.

Usually piracy is spoken of as occurring only upon the high seas. If however a body of pirates land upon an island unappropriated by a civilised power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of commonplace professional piracy. In so far as any definitions of piracy exclude such acts, and others done by pirates elsewhere than on the ocean but of the kind which would be called piratical if done there, the omission may be assumed to be accidental. Piracy no doubt cannot take place independently of the sea, under the conditions at least of modern civilisation; but a pirate does not so lose his piratical character by landing within state territory that piratical acts done on shore cease to be piratical.

In what it  
 consists.

If the foregoing remarks are well founded, piracy may be said to consist in acts of violence done upon the ocean or unappropriated lands, or within the territory of a state through descent from the sea, by a body of men acting independently of any politically organised society.

<sup>1</sup> Molloy (bk. i. ch. iv. § 1) describes a pirate as 'a sea thief, a hostis humani generis, who to enrich himself, either by surprise or open force, sets upon merchants or other traders by sea.' Casaregis (disc. lxiv. 4) says, '*proprie pirata ille dicitur qui sine patentibus alicujus principis ex propria tantum et privata auctoritate per mare discurrit depredendi causa.*' Kent (Comm. i. 183) calls piracy 'a robbery or a forcible depredation on the high seas, without lawful authority, and done animo furandi, and in the spirit and intention of universal hostility.' Wheaton (Elem. pt. ii. ch. ii. § 15) defines piracy as being 'the offence of depredating on the seas, without being authorised by any sovereign state, or with commissions from different sovereigns at war with each other.' Riquelme (i. 237) says that '*los piratas, segun la ley de las naciones, son aquellos que corren los mares por su propia autoridad, y no bajo el pabellon de un Estado civilizado, para cometer toda clase de desafueros à mano armada,*

The various acts which are recognised or alleged to be piratical may be classed as follows :—

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1. Robbery or attempt at robbery of a vessel, by force or intimidation, either by way of attack from without, or by way of revolt of the crew and conversion of the vessel and cargo to their own use.

Classifica-  
tion of acts  
which are  
piratical,  
or are  
alleged to  
be piratical.

2. Depredation upon two belligerents at war with one another under commissions granted by each of them.

3. Depredations committed at sea upon the public or private vessels of a state, or descents upon its territory from the sea by persons not acting under the authority of any politically organised community, notwithstanding that the objects of the persons so acting may be professedly political. Strictly all acts which can be thus described must be regarded as in a sense piratical. In the most respectable instances they are acts of war which, being done in places where international law alone rules, or from such places as a base, and being therefore capable of justification only through

ya en paz ya en guerra, contra los buques de todos los pueblos.' Ortolan (Dip. de la Mer, liv. ii. ch. xi) considers that 'à proprement parler, dans le sens le plus restreint et le plus généralement adopté, les pirates ou forbans sont ceux qui courent les mers de leur propre autorité, pour y commettre des actes de déprédation, pillant à main armée, soit en temps de paix, soit en temps de guerre, les navires de toutes les nations, sans faire aucune distinction que celle qui leur convient pour assurer l'impunité de leurs méfaits.' Phillimore (i. § cccliii) calls piracy 'an assault upon vessels navigated on the high seas, committed animo furandi, whether the robbery or forcible depredation be effected or not, and whether or not it be accompanied by murder or personal injury.' Heffter (§ 104) says that it 'consiste dans l'arrestation et dans la prise violente de navires et des biens qui s'y trouvent, dans un but de lucre et sans justifier d'une commission délivrée à cet effet par un gouvernement responsable.' Bluntachli (§ 343) lays down that 'les navires sont considérés comme pirates, qui sans l'autorisation d'une puissance belligérante, cherchent à s'emparer des personnes, à faire du butin (navires et marchandises), ou à anéantir dans un but criminel les biens d'autrui.' Calvo (§ 267) understands by piracy 'tout vol ou pillage d'un navire ami, toute déprédation, toute acte de violence commis à main armée en pleine mer contre la personne ou les biens d'un étranger, soit en temps de paix, soit en temps de guerre.'

Bernard (The Neut. of Great Britain, 118) and Dana (Notes to Wheaton, Nos. 83-4) have valuable remarks on what does, and what does not, constitute piracy.



PART II. international law, are nevertheless done by persons who do  
 CHAP. VI. not even satisfy the conditions precedent of an attempt to become subjects of law, and who cannot consequently claim like unrecognised political societies to be endeavouring to establish their position as such. Often however the true character of the acts in question is far from corresponding with their legal aspect. Sometimes they are wholly political in their objects and are directed solely against a particular state, with careful avoidance of depredation or attack upon the persons or property of the subjects of other states. In such cases, though the acts done are piratical with reference to the state attacked, they are for practical purposes not piratical with reference to other states, because they neither interfere with nor menace the safety of those states nor the general good order of the seas. It will be seen presently that the difference between piracy of this kind and piracy in its coarser forms has a bearing upon usage with respect to the exercise of jurisdiction.

4. A disposition has occasionally been shown to regard as pirates persons taking letters of marque from one of two belligerents, their own state being at peace with the other belligerent. In 1839, France being at war with Mexico, Admiral Baudin, commanding the fleet of the former power, notified that every privateer sailing under the Mexican flag, of which the captain and two-thirds of the crew were not Mexican subjects by birth, would be considered piratical and treated as such; and in 1846, during the war of the United States with Mexico, President Polk suggested in a message to Congress that it might be a question for the criminal courts to decide whether bearers of commissions, issued in blank by the Mexican government, and sold to foreigners by its agents abroad, ought not to be regarded as pirates<sup>1</sup>.

<sup>1</sup> Ortolan, *Dip. de la Mer*, liv. ii. ch. xi, and Annexe H. The United States appear to have made it an object of their policy to secure by treaty from other states that the acceptance of letters of marque by the subjects of a state from one foreign country against another should be reckoned piracy; see treaties

That the views entertained by the French and American governments on these occasions were at variance with usage is confessed, but some writers hold that usage ought to be modified in conformity with them. It is argued that the change should be made because vessels acting in the manner contemplated would be disavowed by the state to which they properly belong, and because it would decline to be responsible for them; because, on the other hand, they do not belong to the state of which they carry the commission, since 'they fulfil none of the conditions required for the impress of a national character;' they are thus destitute of any nationality. The reasoning does not appear to be very conclusive. A vessel cannot be treated as piratical for the mere absence of a clear national character, because a clear national character is at least as much wanting to the vessels of a simply belligerent community as to foreign vessels employed by a sovereign state. In both cases, the acts purporting to be done being in themselves permissible, or at least not criminal, when authorised by a state or other political community, and criminal when not so authorised, the essential point must be that a responsible state or equivalent of a state shall really exist; and it is impossible to maintain that the grant of letters of marque or commissions to foreign vessels does not impose complete responsibility upon the government issuing them. That a practice of granting such letters or commissions would be highly objectionable, and that it would give rise to the most serious abuses, is indisputable; but to say this, and to say that the persons receiving them ought to be treated as pirates, are two very distinct things. The true safeguard against the evils

with France, 1778 (De Martens, Rec. ii. 597); Netherlands, 1782 (id. iii. 447); Sweden, 1783 (ib. 576); Prussia, 1785 (id. iv. 45), and 1828 (Nouv. Rec. vii. 615); England, 1794 (Rec. v. 678); Central America, 1825 (Nouv. Rec. vi. 836); Brazil, 1828 (id. ix. 24); Chile, 1832 (id. xi. 447); Venezuela, 1836 (id. xiii. 564); Peru-Bolivia, 1836 (id. vi. 122); Ecuador, 1836 (Nouv. Rec. Gén. iv. 317); Guatemala, 1849 (id. xiv. 318); San Salvador, 1850 (id. xv. 77).

PART II. which would spring from the practice would be to conclude  
 CHAP. VI. treaties binding the contracting powers not to issue such  
 — letters or commissions. Fortunately the smallness of the  
 number of states which have not now become signatories of  
 the Declaration of Paris renders the question of little im-  
 portance. It would indeed be hardly worth discussing but  
 for the opportunity which it gives of indicating that the  
 true nature of piracy has been consistently observed in the  
 formation of authoritative custom <sup>1</sup>.

Presump-  
 tion in  
 favour of  
 the inno-  
 cence of  
 a public  
 vessel  
 doing acts  
*prima facie*  
 piratical.

It follows from the intimacy of the connection between a  
 state and its public vessels that acts done by the latter must  
 always be presumed in the absence of distinct proof to the  
 contrary to be done under the authority of the state. What-  
 ever therefore may be the nature of the acts done by a ship of  
 war or other public vessel, it cannot be treated as a pirate  
 unless it has evidently thrown off its allegiance to the state  
 under circumstances which prevent it from being looked upon  
 as the instrument of another politically organised community,  
 or unless under like circumstances it has been declared to be  
 piratical by the legitimate government. Unless one or other  
 of these things has occurred, redress for excesses committed  
 by it can only be sought, as the case may demand, either  
 from the regular government of the state or from that of  
 its seceded portion.

Jurisdic-  
 tion over  
 pirates.

As a general rule the vessels of all nations have a right  
 to seize a pirate and to bring him in for trial and punish-  
 ment by the courts of their own country irrespectively of his

<sup>1</sup> Ortolan, *Dip. de la Mer*, liv. ii. ch. xi; Calvo, § 268. Treaties binding  
 the contracting powers not to issue letters of marque to subjects of neutral  
 states were formerly frequent. Besides the treaties between the United States  
 and other powers already cited, see those between England and France, 1786  
 (De Martens, *Rec.* iv. 157); Denmark and Genoa, 1789 (*ib.* 447); Russia and  
 Sweden, 1801 (*id.* vii. 331); United States and Central America, 1825 (*Nouv.*  
*Rec.* vi. 836); United States and Columbia, 1824 (*id.* vi. 1002); France and  
 Venezuela, 1843 (*Nouv. Rec. Gén.* v. 170); France and Chile, 1852 (*id.* xvi.  
 9); France and Honduras, 1856 (*id.* xvi. ii. 153); France and New Grenada,  
 1857 (*ib.* 164); France and San Salvador, 1858 (*ib.* 176); France and Nicaragua,  
 1859 (*ib.* 190).

nationality or of the nationality, if any, of the vessel in which he may be found ; and when weighty reasons exist for suspecting that a vessel is piratical all ships of war have a right to visit her for the purpose of ascertaining her true character. When however piratical acts have a political object, and are directed solely against a particular state, it is not the practice for states other than that attacked to seize, and still less to punish, the persons committing them. It would be otherwise, so far as seizure is concerned, with respect to vessels manned by persons acting with a political object, if the crew, in the course of carrying out their object, committed acts of violence against ships of other states than that against which their political operation was aimed, and the mode in which the crew were dealt with would probably depend upon the circumstances of the case.

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§ 82. Some of the points connected with piracy of a more or less political complexion may be illustrated from recent occurrences.

In 1877 a revolutionary movement took place in Peru, Cases of the the first step in which consisted in the seizure at Callao of <sup>Huascar,</sup> the ironclad *Huascar* by the crew and some of her officers. The ship got under weigh immediately for Iquique, where it was expected that the leader of the movement would be met, and in the course of the next few days, apparently while on her way thither, she took a supply of coals from a British ship without making any arrangement as to payment, and also stopped a British steamer, from which Colonels Varela and Espinosa, two government officials, were taken by force. In the meantime the Peruvian government had issued a decree stating that it would not be responsible for the acts of the persons on board the *Huascar*, of whatever nature they might be. Under these circumstances Admiral de Horsey, who was in command of the English squadron in the Pacific, regarding the acts of the *Huascar* as 'piratical against British subjects, ships, and property,' attacked her and fought an action which remained undecided at nightfall, so that the

PART II. Huascar was able to escape and surrender to a Peruvian  
 CHAP. VI. squadron. In Peru the occurrence gave rise to great excitement, in which the government shared or affected to share, and a demand for satisfaction was made upon England. There the question was referred to the law officers of the crown, who reported in effect that the acts of the Huascar were piratical. The conduct of the Admiral was in consequence approved, and the matter was allowed to drop by Peru<sup>1</sup>.

Virginianus. In 1873, during the insurrection of part of Cuba against Spain, an affair took place of a widely different nature. In 1870, the Virginianus, a vessel registered as the property of an American citizen, but in fact belonging to certain Cuban insurgent leaders, set sail from New York as an American ship, and after making sundry voyages for insurgent objects, found herself at Kingston in the first-mentioned year. There she took on board some men intended to be landed in Cuba, and after also shipping a quantity of fresh hands, who were ignorant of the true destination of the vessel, set sail ostensibly for Limon Bay in Costa Rica. While on her way to Cuba, but upon the open sea, she was chased by and surrendered to the Spanish vessel, the Tornado. She was taken into Santiago de Cuba, and the greater part of those on board, including several British subjects shipped in Jamaica, were shot by order of the general commanding the place. When the Virginianus was captured she was undoubtedly engaged in an illegal expedition, but she had committed no act of piracy, she was sailing under the flag of the United States and with American papers, she offered no resistance, and was in fact unfitted both for offence and defence by the character of her equipment. Although therefore the Spanish authorities had ample reason for watching her, for seizing her if she entered the Cuban territorial waters, and possibly even for precautionary seizure upon the high seas, no excuse existed for regarding the vessel and crew as piratical at the moment of capture. Had they even been seized while

<sup>1</sup> Parl. Papers, Peru, No. 1, 1877.

in the act of landing the passengers the business in which they would have been engaged would not have amounted to piracy. The element of violence would have been wanting. Invasion is in itself an act of violence. But an invasion does not take place when a hundred men land in a country without means of seriously defending themselves, and when their only immediate object is to join their fellow rebels quietly and without observation. The British government demanded and obtained compensation for the families of the British subjects who were executed. In their correspondence with the government of Spain they did not complain of the seizure of the vessel, or of the detention of the passengers and crew, but argued that after this had been effected 'no pretence of imminent necessity of self-defence could be alleged, and it was the duty of the Spanish authorities to prosecute the offenders in proper form of law, and to have instituted regular proceedings on a definite charge before the execution of the prisoners;' maintaining further that had this been done it would have been found that 'there was no charge either known to the Law of Nations or to any municipal law, under which persons in the situation of the British crew of the *Virginus* could have been justifiably condemned to death<sup>1</sup>.'

By the municipal law of many countries acts are deemed piratical and are punished as such which are not reckoned piratical by international law. Thus the slave trade is piratical in England and the United States; and in France the crew of an armed vessel navigating in time of peace with irregular papers become pirates upon the mere fact of irregularity without the commission of any act of violence. It is scarcely necessary to point out that municipal laws extending piracy beyond the limits assigned to it by international custom affect only the subjects of the state enacting them and foreigners doing the forbidden acts within its jurisdiction.

<sup>1</sup> Parl. Papers, lxxvi. 1874.

## CHAPTER VII.

### SELF-PRESERVATION.

PART II. § 83. IN the last resort almost the whole of the duties  
CHAP. VII. of states are subordinated to the right of self-preservation.

Right of  
self-pre-  
servation  
in general.

Where law affords inadequate protection to the individual he must be permitted, if his existence is in question, to protect himself by whatever means may be necessary; and it would be difficult to say that any act not inconsistent with the nature of a moral being is forbidden, so soon as it can be proved that by it, and it only, self-preservation can be secured. But the right in this form is rather a governing condition, subject to which all rights and duties exist, than a source of specific rules, and properly perhaps it cannot operate in the latter capacity at all. It works by suspending the obligation to act in obedience to other principles. If such suspension is necessary for existence, the general right is enough; if it is not strictly necessary, the occasion is hardly one of self-preservation. There are however circumstances falling short of occasions upon which existence is immediately in question, in which, through a sort of extension of the idea of self-preservation to include self-protection against serious hurt, states are allowed to disregard certain of the ordinary rules of law in the same manner as if their existence were involved. This class of cases is not only susceptible of being brought under distinct rules, but evidently requires to be carefully defined, lest an undue range should be given to it.

§ 84. The simplest form of the occasions on which the right of self-preservation, in its more limited sense, arises is offered when, on an overt attack being made upon a state by persons enjoying the protection afforded by the territory of another state, it is useless either from the suddenness of the attack or from other causes to call upon the state which serves as a cover for the act to preserve its neighbour from injury. The attacked state takes upon itself to exercise authority or violence within the territory of the other state, and thereby violates the sovereignty of the latter; it consequently does an act which is *prima facie* hostile, and which can only be divested of the character of hostility by the urgency of the reason for it, and by an evident absence of hostile intention. The conditions of permissible action are therefore, first, that the danger shall be so great and immediate, or so entirely beyond the control of the government of the country which is used by the invaders, that a friendly state may reasonably be expected to consider it more important that the attacked state shall be protected than that its own rights of sovereignty shall be maintained untouched, and secondly, that the acts done by way of self-protection shall be limited to those which are barely necessary for the purpose<sup>1</sup>.

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Permissible action within foreign territory against individuals making it a starting-point for attack.

An instance in which the right of self-preservation was Case of the Caroline.

<sup>1</sup> Phillimore, i. § ccxiii-v; Vattel, liv. iii. ch. vii. § 133; Klüber, § 44; Twiss, i. § 102.

Some writers, while admitting the right of self-protection by means of acts violating the sovereignty of another state, deny that it is a pacific right, and class acts done in pursuance of it with operations of 'imperfect war,' 'any invasion of state territory being' necessarily 'an act of hostility, which may be repelled by force.' (Halleck, i. 95; Calvo, § 132.) It is no doubt open to a state to treat any violation of its territory as an act of war; but a violation of the nature described is not hostile in intention, it may indeed be committed with the express object of preventing occurrences which would lead to war, and it is not directed against the state, or against persons or property belonging to it because they belong to it, but against specific ill-doers because of their personal acts; it therefore differs in very important respects from ordinary acts of war, and it is wholly unnecessary to consider it to be such until the state, of which the territory is violated, elects to regard the acts done in a hostile light.



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exercised in this manner happened during the Canadian rebellion of 1838. A body of insurgents collected to the number of several hundreds in American territory, and after obtaining small arms and twelve guns by force from American arsenals, seized an island at Niagara within the American frontier, from which shots were fired into Canada, and where preparations were made to cross into British territory by means of a steamer called the *Caroline*. To prevent the crossing from being effected, the *Caroline* was boarded by an English force while at her moorings within American waters, and was sent adrift down the falls of Niagara. The cabinet of Washington complained of the violation of territory, and called upon the British government 'to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show also that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it.' There was no difficulty in satisfying the requirements of the United States, which though perhaps expressed in somewhat too emphatic language, were perfectly proper in essence. There was no choice of means, because there was no time for application to the American government; it had already shown itself to be powerless; and a regiment of militia was actually looking on at the moment without attempting to check the measures of the insurgents. Invasion was imminent; there was therefore no time for deliberation. Finally, the action which was taken was confined to the minimum of violence necessary to deprive the invaders of their means of access to British territory. After an exchange of notes the matter was dropped by the government of the United States, which must have felt that it would have been placed in a position of extreme gravity if the English authorities had allowed things to take

their course, and had then held it responsible for consequences, to the production of which long-continued negligence on its part would have been largely contributory<sup>1</sup>.

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—

As the measures taken when a state protects itself by violating the sovereignty of another are confessedly exceptional acts, beyond the limits of ordinary law, and permitted only for the supreme motive of self-preservation, they must evidently be confined within the narrowest limits consistent with obtaining the required end. It is therefore more than questionable whether a state can use advantages gained by such measures to do anything, beyond that which is necessary for immediate self-protection, which it would not otherwise be in a position to do. If, for example, subjects starting from foreign territory to invade the state are captured in the foreign territory in question, in the course of preventive operations, there can be no doubt on the one hand that they can be kept prisoners until the immediate danger is over, but it is evident on the other that they cannot be put upon their trial, or punished for treason, however complete the crime may be, in the same manner as if they had been captured within the state itself.

Limita-  
tions upon  
the right  
of action.

§ 85. The right of self-preservation in some cases justifies the commission of acts of violence against a friendly or neutral state, when from its position and resources it is capable of being made use of to dangerous effect by an enemy, when there is a known intention on his part so to make use of it, and when, if he is not forestalled, it is almost certain that he will succeed, either through the helplessness of the country or by means of intrigues with a party within it. The case, though closely analogous to that already mentioned, so far differs from it that action, instead of being directed against persons whose behaviour it may be presumed is not sanctioned by the state, is necessarily directed against the state itself. The state must be rendered harmless

Permis-  
sible action  
against  
states  
which are  
not free  
agents.

<sup>1</sup> Mr. Webster to Mr. Fox, April 24, 1841, and Lord Ashburton to Mr. Webster, July 28, 1842, Parl. Papers, 1843, lxi. 46-51.

PART II. by its territory being militarily occupied, or by the surrender  
 CHAP. VII. of its armaments being extorted. Although therefore the  
 — measures employed may be consistent with amity of feeling, it is impossible to expect, as in the former case, that a country shall consider it more important that the threatened state shall be protected than that its own rights of sovereignty shall be maintained intact, and while the one state may do what is necessary for its own preservation, the other may resent its action, and may treat it as an enemy. So long however as this does not occur, and war in consequence does not break out, the former professes that its operations are of a friendly nature; it is therefore strictly limited to such action as is barely necessary for its object, and it is evidently bound to make compensation for any injury done by it<sup>1</sup>.

English  
 operations  
 against  
 Denmark,  
 1807.

The most remarkable instance of action of the kind in question is that which is presented by the English operations with respect to Denmark in 1807. At that time the Danes were in possession of a considerable fleet, and of vast quantities of material of naval construction and equipment; they had no army capable of sustaining an attack from the French forces then massed in the north of Germany; it was provided by secret articles in the Treaty of Tilsit, of which the British government were cognizant, that France should be at liberty to take possession of the Danish fleet and to use it against England; if possession had been taken, France 'would have been placed in a commanding position for the attack of the vulnerable parts of Ireland, and for a descent upon the coasts

<sup>1</sup> Grotius (*De Jure Belli et Pacis*, lib. ii. c. ii. § 10) gives the occupation of neutral territory, under such circumstances as those stated, as an illustration of the acts permissible under his law of necessity; and the doctrine of Wolff (*Jus Gentium*, § 339), Lampredi (*Jur. Pub. Univ. Theorem.* pt. iii. cap. vii. § 4), Klüber (§ 44), Twiss (i. § 102), &c. covers the view expressed in the text; its best justification however is that the violation of the rights of sovereignty contemplated by it is not more serious, and is caused by far graver reasons, than can be alleged in support of many grounds of defensive intervention, which have been acted upon, and have been commonly accepted by writers. For defensive intervention, see § 91.

of England and Scotland;’ in opposition, no competent defensive force could have been assigned without weakening the Mediterranean, Atlantic, and Indian stations to a degree dangerous to the national possessions in those regions; the French forces were within easy striking distance, and the English government had every reason to expect that the secret articles of the Treaty of Tilsit would be acted upon. It accordingly made a demand, the presentation of which was supported by a considerable naval and military force, that the Danish fleet should be delivered into the custody of England; but it was at the same time explained that ‘we ask deposit—we have not looked for capture; so far from it, the most solemn pledge has been offered to your government, and it is hereby renewed, that, if our demand be acceded to, every ship of the navy of Denmark shall, at the conclusion of a general peace, be restored to her in the same condition and state of equipment as when received under the protection of the British flag.’ The emergency was one which gave good reason for the general line of conduct of the English government. The specific demands of the latter were also kept within due limits. Unfortunately Denmark, in the exercise of an indubitable right, chose to look upon its action as hostile, and war ensued, the occurrence of which is a proper subject for extreme regret, but offers no justification for the harsh judgments which have been frequently passed upon the measures which led to it<sup>1</sup>.

§ 86. If acts of the foregoing kind are allowed, *a fortiori* acts are also permitted which constitute less direct infringements of the sovereignty and independence of foreign states. A country the peace of which is threatened by persons on board vessels sailing under the flag of another state may in an emergency search and capture such vessels and arrest the persons on board, notwithstanding that as a general rule there is no right of visiting and seizing vessels of a friendly power in time of peace upon the seas. That the act is

Permissible action  
in non-territorial  
waters.

<sup>1</sup> Alison, Hist. of Europe, vi. 474-5.

PART II. somewhat less violent a breach of ordinary rule than the  
 CHAP. VII. acts hitherto mentioned does not however render laxity of  
 conduct permissible, or exonerate a state if the grounds of  
 its conduct are insufficient. As in other cases the danger  
 must be serious and imminent, and prevention through the  
 agency of the state whose rights are disregarded must be  
 impossible.

Case of  
 the Vir-  
 ginus.

A case of which some account has already been given with  
 reference to another point illustrates the different views which  
 may be held as to the circumstances under which protective  
 action of the kind under consideration is legitimate; and it  
 also opens a question whether a state may not have a power  
 of dealing more freely with subjects captured at sea than  
 with such as may be taken prisoners on the soil of a foreign  
 state. It will be remembered that in 1873 the *Virginus*, a  
 vessel registered as the property of an American citizen, but in  
 fact belonging to certain Cuban insurgent leaders, attempted  
 to land upon the island some men, among whom were persons  
 of importance. The vessel was captured when making for  
 Cuba, but while still a considerable distance outside terri-  
 torial waters; and the Spaniards, besides doing illegal acts  
 which are not to the present point, executed the insurgents  
 an board. Whether the danger was sufficient to justify the  
 seizure of the vessel at the moment when it was effected may,  
 to say the least, be doubtful; but assuming urgent danger  
 to have existed, was its capture in other respects permissible,  
 and had the Spanish authorities a right to punish insurgent  
 subjects taken on board? The United States maintained  
 that the fact that the *Virginus* was *prima facie* an American  
 vessel was enough to protect her from interference of any  
 kind outside territorial waters. 'Spain,' argued the Attorney-  
 General in his opinion, 'no doubt has a right to capture a  
 vessel with an American register and carrying the American  
 flag, found on her own waters, assisting or endeavouring  
 to assist the insurrection in Cuba, but she has no right to  
 capture such a vessel on the high seas on an apprehension

that in violation of the neutrality or navigation laws of the United States, she was on the way to assist such rebellion. Spain may defend her territory and people from the hostile attack of what is or appears to be an American vessel ; but she has no jurisdiction whatever on the question as to whether or not such vessel is on the high seas in violation of any law of the United States<sup>1</sup>. In taking up this position the United States in effect denied the right of doing any acts of self-protection upon the high seas in time of peace in excess of ordinary peace rights. In the end, however, the question between it and the Spanish government was settled on the ground that the ship was not duly invested with an American national character, according to the requirements of the municipal law of the United States, so that much of what the latter country had contended for was surrendered. If a vessel fraudulently carrying a national flag may be seized, the right of visit and search to establish the identity of the ship and to substantiate the suspicion of fraud must be conceded ; the broad ground that the *prima facie* character of the ship covers it with an absolute protection has been abandoned. And when once it is granted that the means necessary to bring fraud to light may be taken, and that a ship fraudulently carrying a national flag may be seized, it would seem somewhat pedantic to say that where clear evidence of hostile intention is found on board a vessel it is to be released, however imminent the danger, if it is discovered that the suspicion of fraud is not justified, and that the ship is really a vessel of its professed country, but engaged in an unlawful act which its own government would be bound to prevent if possible. Unless the principle upon which the whole of the present chapter is founded is incorrect it must be unnecessary for a threatened state, if imminently and seriously threatened, to trouble itself with such refinements. Apparently this was the view taken by the English govern-

<sup>1</sup> Parl. Papers, lxxvi. 1874, 65 ; and see President's Message of January 6, 1874, ib. 72.

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ment, which became mixed up in the affair through the presence of Englishmen on board the *Virginus* as part of the crew. In demanding reparation for the death of some of them who were executed it does 'not take the ground of complaining of the seizure of the *Virginus*, nor of the detention of the passengers and crew. . . . Much may be excused,' it was added with reference to their deaths, 'in acts done under the expectation of instant damage in self-defence by a nation as well as by an individual. But after the capture of the *Virginus* and the detention of the crew was effected, no pretence of imminent necessity of self-defence could be alleged<sup>1</sup>.' It is clear from this language that the mere capture of the vessel was an act which the British government did not look upon as being improper, supposing an imminent necessity of self-defence to exist.

Due treatment of subjects captured in foreign vessels in non-territorial waters.

The fate of the insurgents who were captured and executed was not made a question between the English and American governments on the one hand and that of Spain on the other, and no international discussion appears to have taken place with regard to other cases—if other cases have occurred—of subjects captured under like circumstances. General principles of law therefore are the only guide by the help of which the rights of a state over such persons can be arrived at. Looked at by their light the matter would seem to stand thus. Although a merchant ship is not part of the territory of the state to which she belongs, under ordinary circumstances she remains while upon non-territorial waters under the jurisdiction of her own state exclusively; permission to another state to do such acts as may be necessary for self-preservation cannot be supposed in any case to imply a cession of more jurisdiction than is barely necessary for the purpose, and when, as in the present case, no cession of criminal jurisdiction is required, none can be presumed to be made; whether therefore the conduct of persons on board is criminal, and in what sense or to what degree, must be

<sup>1</sup> Parl. Papers, lxxvi. 1874, 85.



tested by reference to the laws of the state to which the vessel belongs, and they ought to be judged by its tribunals. The powers of their own state would seem therefore to be limited to keeping them in custody so long as may be necessary for its safety, and to handing them over afterwards to the state owning the vessel for trial and punishment under any municipal laws which they may have broken by making attacks upon a friendly country. On principle the powers of the capturing state would seem to be no greater over persons captured on non-territorial seas than over persons seized in foreign territory; and the conduct of the Spanish authorities, in shooting the insurgents taken on board the *Virginus*, might have been seriously arraigned by the United States, had the latter country chosen to do so<sup>1</sup>.

§ 87. States possess a right of protecting their subjects abroad which is correlative to their responsibility in respect of injuries inflicted upon foreigners within their dominions; they have the right, that is to say, to exact reparation for maltreatment of their subjects by a foreign government or its administrative agents if no means of obtaining legal redress through the tribunals of the country exist, or if such means as exist have been exhausted in vain; and they have the right to require that, as between their subjects and other

Protection  
of subjects  
abroad.

<sup>1</sup> The British government, in complaining of the execution of British members of the crew after sentence by court martial, said that 'it was the duty of the Spanish authorities to prosecute the offenders in proper form of law, and to have instituted regular proceedings on a definite charge before the execution of the prisoners.' On any principle too much seems to have been conceded in saying this. Whether or not there can be any doubt as to whether a subject of the state, unquestionably guilty of a crime against it, can be punished when he has been seized within foreign jurisdiction, it is impossible to admit that foreigners, who can commit no crime cognisable by the state until they enter it, may be put upon their trial. As the *Virginus* was an unarmed ship, and no resistance could consequently be made, it is difficult to see that the Spanish authorities would have had a right to do more than try the foreign crew 'in proper form of law,' if she had been captured within territorial waters, and in the act of landing her passengers;—a presumption, where a vessel is unarmed, must always exist in favour of the innocence or ignorance of the crew, which can only be destroyed by evidence more carefully sifted than it is likely to be before a court martial,



PART II. private individuals, the protection of the state and the justice  
 CHAP. VII. of the courts shall be afforded equally, and that compensation shall be made if the courts from corruption or prejudice or other like causes are guilty of serious acts of injustice. Broadly, all persons entering a foreign country must submit to the laws of that country; provided that the laws are fairly administered they cannot as a rule complain of the effects upon themselves, however great may be the practical injustice which may result to them; it is only when those laws are not fairly administered, or when they provide no remedy for wrongs, or when they are such, as might happen in very exceptional cases, as to constitute grievous oppression in themselves, that the state to which the individual belongs has the right to interfere in his behalf<sup>1</sup>.

It is evident that the legitimacy of action in any given case and the limits of right action if redress be denied, are so essentially dependent on the particular facts of the case that it is useless, taking the question as a whole, to go beyond the very general statement of principle which has been just made. There is one point however upon which a few words may be added.

Protection  
 with re-  
 spect to  
 debts due  
 from  
 foreign  
 states.

It has become a common habit of governments, especially in England, to make a distinction between complaints of persons who have lost money through default of a foreign state in paying the interest or capital of loans made to it and the complaints of persons who have suffered in other ways. In the latter case, if the complaint is thought to be

<sup>1</sup> Phillimore, ii. § ii-iii; Bluntschli, § 380, 386; Calvo, § 290. The latter writer (§ 291) narrates a dispute which took place between England and Prussia as an illustrative case. The question at issue was the conduct of a certain criminal court in the latter country, before which an English subject was brought. As M. Calvo has given the name of the accused person, as from the date of the occurrence the latter is very likely to be still alive, and as the affair would have been highly discreditable to him if M. Calvo's account bore any resemblance to the facts, it is to be regretted that M. Calvo did not take the precaution of looking into the English Blue Book (Parl. Papers, 1861. lxxv), where the most complete materials for forming an accurate judgment are provided. Had he done so, the story would have assumed a very different aspect in his pages.

well founded, it is regarded as a pure question of expediency on the facts of the particular case or of the importance of the occurrence whether the state shall interfere, and if it does interfere, whether it shall confine itself to diplomatic representations, or whether, upon refusal or neglect to give redress, it shall adopt measures of constraint falling short of war, or even resort to war itself. In the former case, on the other hand, governments are in the habit of refusing to take any steps in favour of the sufferers, partly because of the onerousness of the responsibility which a state would assume if it engaged as a general rule to recover money so lost, partly because loans to states are frequently, if not generally, made with very sufficient knowledge of the risks attendant on them, and partly because of the difficulty which a state may really have, whether from its own misconduct or otherwise, in meeting its obligations at the time when it makes default. Fundamentally however there is no difference in principle between wrongs inflicted by breach of a monetary agreement and other wrongs for which the state, as itself the wrong-doer, is immediately responsible. The difference which is made in practice is in no sense obligatory; and it is open to governments to consider each case by itself and to act as seems well to them on its merits<sup>1</sup>.

<sup>1</sup> The policy which has been pursued by England was laid down in 1848 by Lord Palmerston in the following terms, in a circular addressed to the British representatives in foreign states:—

‘Her Majesty’s government have frequently had occasion to instruct her Majesty’s representatives in various foreign states to make earnest and friendly, but not authoritative representations, in support of the unsatisfied claims of British subjects who are holders of public bonds and money securities of those states.

‘As some misconception appears to exist in some of those states with regard to the just right of her Majesty’s government to interfere authoritatively, if it should think fit to do so, in support of those claims, I have to inform you, as the representative of her Majesty in one of the states against which British subjects have such claims, that it is for the British government entirely a question of discretion, and by no means a question of international right, whether they should or should not make this matter the subject of diplomatic negotiation. If the question is to be considered simply in its bearing on international right, there can be no doubt whatever of the perfect right which the

PART II. When the subject of a state is not merely passing through,  
 CHAP. VII. or temporarily resident in, a foreign country, but has become domiciled there, the right of his state to protect him is somewhat affected. He has deliberately made the foreign country the chief seat of his residence; for many purposes, as will be seen later<sup>1</sup>, he has become identified with it; he must be supposed to obtain some advantages from this

government of every country possesses to take up, as a matter of diplomatic negotiation, any well-founded complaint which any of its subjects may prefer against the government of another country, or any wrong which from such foreign government those subjects may have sustained; and if the government of one country is entitled to demand redress for any one individual among its subjects who may have a just but unsatisfied pecuniary claim upon the government of another country, the right so to require redress cannot be diminished merely because the extent of the wrong is increased, and because instead of there being one individual claiming a comparatively small sum, there are a great number of individuals to whom a very large amount is due.

'It is therefore simply a question of discretion with the British government whether this matter should or should not be taken up by diplomatic negotiation, and the decision of that question of discretion turns entirely upon British and domestic considerations.

'It has hitherto been thought by the successive governments of Great Britain undesirable that British subjects should invest their capital in loans to foreign governments instead of employing it in profitable undertakings at home; and with a view to discourage hazardous loans to foreign governments, who may be either unable or unwilling to pay the stipulated interest thereupon, the British government has hitherto thought it the best policy to abstain from taking up as international questions the complaints made by British subjects against foreign governments which have failed to make good their engagements in regard to such pecuniary transactions.

'For the British government has considered that the losses of imprudent men, who have placed mistaken confidence in the good faith of foreign governments, would prove a salutary warning to others, and would prevent any other foreign loans from being raised in Great Britain, except by governments of known good faith and ascertained solvency. But nevertheless it might happen that the loss occasioned to British subjects by the non-payment of interest upon loans made by them to foreign governments might become so great that it would be too high a price for the nation to pay for such a warning as to the future, and in such a state of things it might become the duty of the British government to make these matters the subject of diplomatic negotiation.' (Quoted by Phillimore, ii. § v.) A short time previously Lord Palmerston, in answer to a question in the House of Commons, indicated that under certain circumstances he might be prepared to go to the length of using force. The doctrine and the principles of policy laid down in Lord Palmerston's circular have been lately re-affirmed by Lord Salisbury. See the *Times* of January 7, 1880.

<sup>1</sup> Pt. iii. chap. vi.

intimacy of association, since its existence is dependent on his own act; it would be unreasonable that he should be allowed to reap these advantages on the one hand, and that on the other he should retain the special advantages of a completely foreign character. To what degree the right of a government to protect a subject is thus modified it is at present impossible to say with any precision in the abstract; but the rule is one which can in general be probably applied without much difficulty in individual cases.

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## CHAPTER VIII.

### INTERVENTION.

PART II.  
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—  
The equi-  
vocal cha-  
racter of  
interven-  
tion.

§ 88. INTERVENTION takes place when a state interferes in the relations of two other states without the consent of both or either of them, or when it interferes in the domestic affairs of another state irrespectively of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it. *Primâ facie* intervention is a hostile act, because it constitutes an attack upon the independence of the state subjected to it. Nevertheless its position in law is somewhat equivocal. Regarded from the point of view of the state intruded upon it must always remain an act which, if not consented to, is an act of war. But from the point of view of the intervening power it is not a means of obtaining redress for a wrong done, but a measure of prevention or of police, undertaken sometimes for the express purpose of avoiding war. In the case moreover of intervention in the internal affairs of a state, it is generally directed only against a party within the state, or against a particular form of state life, and it is frequently carried out in the interest of the government or of persons belonging to the invaded state. It is therefore compatible with friendship towards the state as such, and it may be a pacific measure, which becomes war in the intention of its authors only when resistance is offered, not merely by persons

within the state and professing to represent it, but by the state through the persons whom the invading power chooses to look upon as its authorised agents. Hence although intervention often ends in war, and is sometimes really war from the commencement, it may be conveniently considered abstractedly from the pacific or belligerent character which it assumes in different cases.

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It may also be worth while to simplify the discussion of the subject by avoiding express reference to intervention as between different states, all questions relating to the conditions under which such intervention may take place being covered by the principles applicable in the more complex case of intervention in the internal affairs of a single state.

§ 89. It has been seen that though as a general rule a state lies under an obligation to respect the independence of others, there are rights which may in certain cases take precedence of the right of independence, and that in such cases it may be disregarded if respect for it is inconsistent with a due satisfaction of the superior right<sup>1</sup>. The permissibility of an infringement of the right of independence being thus dependent upon an incompatibility of respect for it with a right which may claim priority over it, the legality of an intervention must depend on the power of the intervening state to show that its action is sanctioned by some principle which can, and in the particular case does, take precedence of it. That this may sometimes be done is undisputed; but the right of independence is so fundamental a part of international law, and respect for it is so essential to the existence of legal restraint, that any action tending to place it in a subordinate position must be looked upon with disfavour, and any general grounds of intervention pretending to be sufficient, no less than their application in particular cases, may properly be judged with an adverse bias.

General  
conditions  
of the  
legality  
of interven-  
tion.

§ 90. The grounds upon which intervention has taken place, or upon which it is said with more or less of authority

Classifica-  
tion of the  
grounds

<sup>1</sup> See § 11, 12.

PART II. that it is permitted, may be referred to the right of self-  
CHAP. VIII. preservation, to a right of opposing wrong-doing, to the

upon which intervention has  
taken place, or which  
are alleged to be suf-  
ficient. Self-pre-  
servation.

duty of fulfilling engagements, and to friendship for one  
of two parties in a state.

§ 91. Interventions for the purpose of self-preservation  
naturally include all those which are grounded upon danger  
to the institutions, to the good order, or to the external  
safety of the intervening state.

To some of these no objection can be offered. If a govern-  
ment is too weak to prevent actual attacks upon a neighbour  
by its subjects, if it fomented revolution abroad, or if it  
threatens hostilities which may be averted by its overthrow,  
a menaced state may adopt such measures as are necessary  
to obtain substantial guarantees for its own security. The  
state which is subjected to intervention has either failed to  
satisfy its international duties or has intentionally violated  
them. It has done or permitted a wrong, to obtain redress  
for which the intervening state may make war if it chooses.  
If war occurs the latter may exact as one of the conditions  
of peace at the end that a government shall be installed  
which is able and willing to observe its international obli-  
gations. And if the intervening state may make war, *a*  
*fortiori* it may gain the same result in a milder way. When  
however the danger against which intervention is levelled  
does not arise from the acts or omissions of the state, but  
is merely the indirect consequence of the existence of a form  
of government, or of the prevalence of ideas which are op-  
posed to the views held by the intervening state or its rulers,  
intervention ceases to be legitimate. To say that a state  
has a right to ask a neighbour to modify its mode of life,  
apart from any attempt made by it to propagate the ideas  
which it represents, is to say that one form of state life has  
a right to be protected at the cost of the existence of another ;  
in other words, it is to ignore the fundamental principle that  
the right of every state to live its life in a given way is  
precisely equal to that of another state to live its life in

another way. The claim besides is essentially inequitable in other respects. Morally a state cannot be responsible for the effect of example upon the minds of persons who are not under its control, and whom it does not voluntarily influence. If the intervening state is imperilled, its danger comes from the spontaneous acts of its own subjects or of third parties, and it is against them that it must direct its precautions<sup>1</sup>.

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Intervention to hinder internal changes in a state from prejudicing rights of succession or of feudal superiority possessed by the intervening state is recognised as legitimate by some writers. Unquestionably, in the abstract, if provision is made by treaty for the union of one state with another upon the occurrence of certain contingencies, the state to which the right of succession belongs is justified in taking whatever measures may be necessary to protect its reversionary interests. A state may of course contract itself out of its common law rights. In agreeing to invest another state with rights over itself, whether contingent on the extinction of its ruling family or on anything else, it must be held to have surrendered its right of dealing with itself in matters affecting the reversion which it has granted; and though the engagements into which it has entered may in time become extremely onerous, and it may be morally justified in endeavouring to escape from them, it has obviously no reason to expect the state with which it has contracted to consent upon such grounds to a rescission of the agreement. But it must be remembered that the arrangements of this

Interven-  
tion to  
preserve  
rights of  
succession.

<sup>1</sup> De Martens, *Précis*, § 74; Wheaton, *Elem.* pt. ii. ch. i. § 3; Phillimore, i. § cccxxxvii-viii. and cccxcii; Halleck, i. 83, quoting a speech of Chateaubriand upon the French intervention in Spain in 1823, as stating the rule clearly, and i. 465; Bluntschli, § 474 note, and § 478; Mamiani, 100-1; Fiore, i. 219. Calvo (§ 96-7) adheres to the principles stated by Lord Castlereagh in his circular of the 19th January, 1821. *British and Foreign State Papers*, 1820-1, p. 1160. Vattel, liv. ii. ch. iv. § 54 and 57, ignores self-preservation as a ground of intervention, but admits the adequacy of the weaker reason of oppression by a tyrannical sovereign, § 56. Heffter, § 30-1 and 44-5, while also sanctioning intervention on more doubtful grounds, limits what may be done under that of self-preservation to negotiation or to the establishment at most of a military cordon.



PART II. nature which have been usually made have either been family  
 CHAP. VIII. compacts between proprietary sovereigns, or have been de-  
 signed to provide rather for the succession of a family than  
 of a state. In such cases the permissibility of intervention  
 can hardly be conceded. International law no longer recog-  
 nises a patrimonial state. A country is not identified with  
 its sovereign. He is merely its organ for certain purposes,  
 and it has no right to interfere for an object which is personal  
 to him. The question of the permissibility of intervention  
 must in fact depend upon whether, at the time of the arrange-  
 ment being made upon which intervention is based, it was  
 intended by both states that in the contingency contemplated  
 a union should be effected irrespectively of the form of govern-  
 ment or of the persons composing the government of the  
 state owning the succession. If this was not intended, the  
 engagement, whether implied or expressed, is not one entered  
 into by the states but by individuals, who from their position  
 have the opportunity of giving to their personal agreements  
 the form of a state act; and it then only becomes possible  
 to answer in one way the question put by Sir R. Phillimore,  
 who asks whether it can be denied that when 'a state, having  
 occupied for a long period the position of a free and inde-  
 pendent nation in the society of other states, thinks fit to  
 secure its constitution, and to pass a fundamental law, similar  
 to that by which Great Britain excluded James II and his  
 descendants from her throne, that no Prince of a certain race  
 shall be henceforth their ruler, the exercise of such a power  
 is inherent in the nature of an independent state<sup>1</sup>.'

Interven-  
 tions in  
 restraint

§ 92. Interventions which have for their object to check  
 illegal intervention by another state are based upon the

<sup>1</sup> Phillimore, i. § cccc; De Martens, Précis, § 75; Heffter, § 45; Calvo, § 93; Blun'schli, § 479. The latest occasions on which any question of intervention on the above ground seems to have arisen were in 1849, when, according to Phillimore, Austria meditated, but did not carry out, an intervention in Tuscany, and in 1860, when Spain appears to have intervened diplomatically on behalf of the Duchess of Parma, on the occasion of the annexation of Parma to the kingdom of Italy by a popular vote.

principle that a state is at liberty to oppose the commission of any act, which in the eye of the law is a wrong; and the frequent interventions which have taken place upon the real or pretended grounds of humanity and religion must be defended, in so far as they can be defended at all, upon the same principle, coupled with the assumption that international law forbids the conduct of rulers to their subjects, and of parties in a state towards each other, which such interventions are intended to repress.

PART II.  
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—  
of wrong-  
doing :

It has already been seen that the existence of a right to oppose acts contrary to law, and to use force for the purpose when infractions are sufficiently serious, is a necessary condition of the existence of an efficient international law. It is incontestable that a grave infraction is committed when the independence of a state is improperly interfered with; and it is consequently evident that another state is at liberty to intervene in order to undo the effects of illegal intervention, and to restore the state subjected to it to freedom of action<sup>1</sup>.

1. against  
illegal acts;

Interventions of the second kind stand in a very different position. International law professes to be concerned only with the relations of states to each other. Tyrannical conduct of a government towards its subjects, massacres and brutality in a civil war, or religious persecution are acts which have nothing to do directly or indirectly with such relations. On what ground then can international law take cognizance of them? Apparently on one only, if indeed it be competent to take cognizance of them at all. It may be supposed to declare that acts of the kind mentioned are so inconsistent with the character of a moral being as to constitute a public scandal, which the body of states, or one or more states as representative of it, are competent to suppress. The supposition strains the fiction that states which are under international law form a kind of society to an extreme point, and some of the special grounds, upon which intervention effected under its sanction is based, are

2. against  
immoral  
acts.

<sup>1</sup> Heffter, § 96; Mamiani, 104; Fiore, i. 224; Bluntschli, § 479.

PART II. not easily distinguishable in principle from others which  
CHAP. VIII. modern opinion has branded as unwarrantable. To some minds the excesses of a revolution would seem more scandalous than the tyranny of a sovereign. In strictness they ought, degree for degree, to be precisely equivalent in the eye of the law. While however it is settled that as a general rule a state must be allowed to work out its internal changes in its own fashion, so long as its struggles do not actually degenerate into internecine war, and intervention to put down a popular movement or the uprising of a subject race is wholly forbidden, intervention for the purpose of checking gross tyranny or of helping the efforts of a people to free itself is very commonly regarded without disfavour. Again, religious oppression, short of a cruelty which would rank as tyranny, has ceased to be recognised as an independent ground of intervention, but it is still used as between Europe and the East as an accessory motive, which seems to be thought by many persons sufficiently praiseworthy to excuse the commission of acts in other respects grossly immoral. Not only in fact is the propriety or impropriety of an intervention directed against an alleged scandal judged by the popular mind upon considerations of sentiment to the exclusion of law, but sentiment has been allowed to influence the more deliberately formed opinions of jurists. That the latter should have taken place cannot be too much regretted. In giving their sanction to interventions of the kind in question jurists have imparted an aspect of legality to a species of intervention, which makes a deep inroad into one of the cardinal doctrines of international law; of which the principle is not even intended to be equally applied to the cases covered by it; and which by the readiness with which it lends itself to the uses of selfish ambition becomes as dangerous in practice as it is plausible in appearance.

It is unfortunate that publicists have not laid down broadly and unanimously that no intervention is legal, except for the purpose of self-preservation, unless a breach of the law as

between states has taken place, or unless the whole body of civilised states have concurred in authorising it. Interventions, whether armed or diplomatic, undertaken either for the reason or upon the pretexts of cruelty, or oppression, or the horrors of a civil war, or whatever the reason put forward, supported in reality by the justification which such facts offer to the popular mind, would have had to justify themselves, when not authorised by the whole body of civilised states accustomed to act together for common purposes, as measures which, being confessedly illegal in themselves, could only be excused in rare and extreme cases in consideration of the unquestionably extraordinary character of the facts causing them, and of the evident purity of the motives and conduct of the intervening state. The record of the last hundred years might not have been much cleaner than it is ; but evil-doing would have been at least sometimes compelled to show itself in its true colours ; it would have found more difficulty in clothing itself in a generous disguise ; and international law would in any case have been saved from complicity with it <sup>1</sup>.

<sup>1</sup> The opinions of the modern international jurists who touch upon humanitarian intervention are very various, and for the most part the treatment which the subject receives from them is merely fragmentary, notice being taken of some only of its grounds, which are usually approved or disapproved of without very clear reference to a general principle. Vattel (liv. i. ch. iv. § 56) considers it permissible to succour a people oppressed by its sovereign, but does not appear to sanction any of the analogous grounds of intervention. Wheaton (Elem. pt. ii. ch. i. § 9), Bluntschli (§ 478), Mamiani (p. 86), Fiore (i. 225), give the right of aiding an oppressed race. Heffter (§ 46), while denying the right of intervention to repress tyranny, holds that so soon as civil war has broken out a foreign state may assist either party engaged in it. Calvo (§ 103) and Fiore (i. 223) think that states can intervene to put an end to crimes and slaughter. Mamiani (112), on the other hand, refuses to recognise intervention on this ground. 'Per vero, he says, 'a qual diritto positivo degli altri popoli e recata ingiuria? Udiste mai alcuno che affermi essere nell' uomo il diritto di non avere dinanzi agli occhi se non buoni modelli di virtù, e vivere tra cittadini nelle cui abitazioni non si commettano eccessi d'alcuna sorta e i quali tutti professino opinioni vere e ammodate?' The reason is doubtfully admitted by Phillimore (i. § cccxciv) and Halleck (i. 465) as accessory to stronger ones, such as self-defence or the duties of a guarantee. Phillimore (i. § cccii-iv) is the only writer who seems to sanction intervention on the ground of religion.

A circular issued by the Russian government, when England and France

PART II. § 93. It may perhaps at one time have been an open question  
 CHAP. VIII. whether a right or a duty of intervention could be set up by  
 ———  
 Intervention under a treaty of guarantee. a treaty of guarantee binding a state to maintain a particular dynasty or a particular form of government in the state to which the guarantee applied. But the doctrine that intervention on this ground is either due or permissible involves the assumption that independent states have not the right to change their government at will, and is in reality a relic of the exploded notion of ownership on the part of the sovereign. According to the views which are now held as to the relation of monarchical or other governments to the states which they represent, no case could arise under which a treaty of the sort could be both needed and legitimate. As against interference by a foreign power the general right of checking illegal intervention is enough to support counter interference; and as against a domestic movement it is evident that a contract of guarantee is made in favour of a party within the state and not of the state as a whole, that it therefore amounts to a promise of illegal interference, and that being thus illegal itself, it cannot give a stamp of legality to an act which without it would be unlawful<sup>1</sup>.

suspended diplomatic relations with Naples in consequence of the inhumanity with which the kingdom was ruled, is not without value in itself, and is of especial interest as issuing from the source from which it came. 'We could understand,' it says, 'that as a consequence of friendly forethought one government should give advice to another in a benevolent spirit, that such advice might even assume the character of exhortation; but we believe that to be the furthest limit allowable. Less than ever can it now be allowed in Europe to forget that sovereigns are equal among themselves, and that it is not the extent of territory, but the sacred character of the rights of each which regulates the relations that exist between them. To endeavour to obtain from the King of Naples concessions as concerns the internal government of his state by threats, or by a menacing demonstration, is a violent usurpation of his authority, an attempt to govern in his stead; it is an open declaration of the right of the strong over the weak.' Martin, *Life of the Prince Consort*, iii. 510.

<sup>1</sup> Some treaties, e.g. the Treaties in 1713, by which Holland, France, and Spain guaranteed the Protestant succession in England (Dumont, viii. i. 322, 339, 393), and the Final Act of the Germanic Confederation, arts. 25 and 26 (De Martens, *Nouv. Rec.* v. 489), contain guarantees which clearly extend to cases arising out of purely internal troubles; most treaties of guarantee how-

§ 94. It is generally said, and the statement is of course open to no question, that intervention may take place at the invitation of both parties to a civil war. But it is also sometimes said, even by modern writers, that interventions carried out at the invitation of one only of the two parties are not always illegal. They are permitted, for example, both by M. Bluntschli and M. Heffter<sup>1</sup>. The former of these writers concedes a right of intervention on behalf of an established government, for so long as it may be considered the organ and representative of the state; and the latter grants it in favour of whichever side appears to be in the right. It is hard to see by what reasoning these views can be supported. As interventions, in so far as they purport to be made in compliance with an invitation, are independent of the reasons or pretexts which have been already discussed, it must be assumed that they are based either on simple friendship or upon a sentiment of justice. If intervention on the ground of mere friendship were allowed, it would be idle to speak seriously of the rights of independence. Supposing the intervention to be directed against the existing government, independence is violated by an attempt to prevent the regular organ of the state from managing the state affairs in its own way. Supposing it on the other hand to be directed against

PART II.  
CHAP. VIII.

Interven-  
tion by  
invitation  
of a party  
to a civil  
war.

ever are directed against the possible action of foreign powers. Twiss (i. § 231), Halleck (i. 85), Fiore (i. 227) deny the right of intervention under a treaty of guarantee. Taking what Vattel (liv. ii. ch. xii. § 196-7) says as a whole he may probably be understood to express the same doctrine. Phillimore (ii. § lvi) appears to be somewhat doubtful. De Martens (Précis, § 78), Klüber (§ 51), and Heffter (§ 45) allow intervention under a treaty of guarantee.

<sup>1</sup> Bluntschli, § 476-7; Heffter, § 46. See also Vattel, liv. ii. ch. iv. § 56. Phillimore (i. § cccxcv) considers that intervention upon the application of one party to a civil war 'can hardly be asserted to be at variance with any abstract principle of international law, while it must be admitted to have received continual sanction from the practice of nations.' Halleck (i. 87) on the other hand holds what might seem the obvious truth that an invitation 'from only one of the contestants can by itself confer no rights whatever as against the other party.' Mamiani (p. 85), who is followed almost textually by Fiore (i. 215), places the matter on its right footing.

PART II. rebels, the fact that it has been necessary to call in foreign  
 CHAP. VIII. help is enough to show that the issue of the conflict would  
 — without it be uncertain, and consequently that there is a  
 doubt as to which side would ultimately establish itself as the  
 legal representative of the state. If, again, intervention is  
 based upon an opinion as to the merits of the question at  
 issue, the intervening state takes upon itself to pass judgment  
 in a matter which, having nothing to do with the relations  
 of states, must be regarded as being for legal purposes beyond  
 the range of its vision.

Interven-      § 95. A somewhat wider right of intervention than that  
 tion under      which is possessed by individual states may perhaps belong  
 the author-      to the body of states, or to some of them acting for the whole  
 ity of the      in good faith with sufficient warrant. In the general interests  
 body of      of Europe, for example, an end might be put to a civil war  
 states.      -by the compulsory separation of the parties to it, or a parti-  
                  cular family or a particular form of government might be  
                  established and maintained in a country, if the interests to be  
                  guarded were strictly international, and if the maintenance  
                  of the state of things set up were a reasonable way of  
                  attaining the required object. In this case the original inter-  
                  vention, any treaties of guarantee which might be concluded,  
                  and any interventions which might spring from them, would  
                  only be instances of the control which when necessary the  
                  society of states may exercise over its members for the  
                  common safety of all.

## CHAPTER IX.

### THE AGENTS OF A STATE IN ITS INTERNATIONAL RELATIONS.

§ 96. THE agents of a state in its international relations PART II.  
CHAP. IX.  
are—

i. The person or persons to whom the management of Agents of  
a state.  
foreign affairs is committed.

ii. Agents subordinate to these, who are—

1. Public diplomatic agents,
2. Officers in command of the armed forces of the state,
3. Persons charged with diplomatic functions but without publicly acknowledged character,
4. Commissioners employed for special objects, such as the settlement of frontiers, supervision of the execution of a treaty, &c.

With international agents of the state properly so called may be classed consuls, who are only international state agents in a qualified sense.

§ 97. The person or persons who constitute the first-men- Persons to  
whom the  
manage-  
ment of  
foreign  
affairs is  
committed  
by the con-  
stitution of  
the state.  
tioned kind of state agent are determined by the public law  
of the state the agents of which they are. A state may con-  
fide the whole management of its international affairs to a  
single person, or to a group of persons made up in one of  
many different ways; but, as was before mentioned, foreign  
states are indifferent to the particular form of the government  
under which a community may choose to place itself, and can



PART II. only require that there shall be an ascertained agent or organ  
 CHAP. IX. of some kind. However the organ may be constituted, it is  
 — completely representative of the state; its acts are the acts  
 of the state, and are definitively binding on the latter so  
 long as the authority delegated by it has not been recalled.  
 For international purposes the continuance or the recall of  
 authority is judged of solely upon the external facts of the  
 case; so long as a person or body of persons are undisputably  
 in possession of the required power, foreign states treat with  
 them as the organ of the state; so soon as they cease to be  
 the actual organ, foreign states cease dealing with them; and  
 it is usual, if the change is unquestionably final, to open rela-  
 tions with their successors independently of whether it has  
 been effected constitutionally. When the finality of the  
 change is doubtful, it is open to a government in the exer-  
 cise of its discretion, under the same limitations with which  
 it is open in the case of newly-formed states, either to  
 treat the person or body in whom the representation of the  
 country is lodged as being established, or to enter only into  
 such relations of an imperfect kind as may be momentarily  
 necessary.

Observ-  
 ances due  
 to a sove-  
 reign in  
 a foreign  
 state;

When a state has an individual head, whether he be a  
 sovereign or the chief of a republican government, he is con-  
 sidered so to embody the sovereignty of his state that the  
 respect due to the state by foreign powers in virtue of its  
 sovereignty is reflected upon him, and takes the form of  
 personal observances, some of which are purely honorary,  
 while others rest upon the double foundation of respect and of  
 their necessity to enable the head of the state when abroad to  
 be free to exercise the functions with which he is usually  
 invested. The nature and extent of the latter observances  
 have already been discussed<sup>1</sup>; the former, in so far as their  
 specific forms are concerned, are mere matters of etiquette,—  
 it is sufficient to remark with reference to them that their  
 object being to express the respect due to an independent

<sup>1</sup> § 49.

state, an intentional neglect to comply with them must be regarded as an insult to the state, and consequently as being an act which it has a right to resent. PART II.  
CHAP. IX.  
—

Although no difference exists between the observances due to hereditary and elective heads of a state in their capacity of heads, a certain difference appears in the conditions under which they are respectively regarded as appearing in that capacity. An hereditary sovereign is always looked upon as personifying his state, except when he suppresses his identity by travelling in foreign countries incognito, or when he puts himself in a position inconsistent with the assertion of sovereignty by taking service under another sovereign; the chief of a republic, on the other hand, only embodies the majesty of his state when he ostensibly acts as its representative. to an  
elective  
head of a  
state.

§ 98. The political relations of states are as a rule carried on by diplomatic agents, acting under the superior organs of their states, and either accredited for the conduct of particular negotiations or resident in a foreign state and employed in the general management of affairs. Diplomatic  
agents.

As those states which live under international law are practically unable to withdraw themselves wholly from intercourse with other states, and as diplomatic agents are the means by which necessary intercourse is kept up, it is not in a general way permissible for a state to refuse to receive a diplomatic agent from another power, when the latter conceives that it is proper to send him, and a state has of course conversely the right to send one when it chooses; in practice, all states, with the exception perhaps of a few very minute ones, have for a long time past accredited permanent representatives to all foreign civilised states of any importance. Every state can however refuse to receive diplomatic agents for the special reasons that their reception may be taken to imply acquiescence in claims inconsistent with rights belonging to the state to which they are sent, or that the particular agent is individually objectionable upon personal grounds. Thus England did not receive a legate or nuncio from the

**PART II.** Pope when he was a temporal sovereign, and other states  
**CHAP. IX.** have on several occasions refused to receive legates when invested with powers incompatible with the state constitution; countries again have refused to accept ministers whose political opinions have been known to be at variance with the established regime, or who have been personally disagreeable to the sovereign, and states frequently make it a rule not to allow their own subjects to be diplomatically accredited to them.

Creden-  
tials.

A diplomatic agent enters upon the exercise of his functions from the moment, and from the moment only, at which the evidence that he has been invested with them is presented by him to the government to which he is sent, or to the agents of other governments whom he is intended to meet, and has been received by it or them. When he is sent to a specific state the evidence with which he is required to be furnished consists in a letter of credence and in powers to negotiate. The object of the former is to communicate the name of the bearer, to specify his rank as ambassador, minister plenipotentiary, minister resident, or chargé d'affaires, and finally to bespeak credit for what he will communicate in the name of his government. The powers may either be contained in the letter of credence, or, as is more usual, they may be conferred by letters patent; their object is to define the limits within which the bearer has the right of negotiating and within which, subject to the qualifications which will be made in discussing treaties, his acts are binding on his government. Ambassadors or ministers not accredited to a specific state, but sent to a congress or conference, are not generally provided with letters of credence, their full powers, copies of which are exchanged, being regarded as sufficient.

Rights of a  
diplomatic  
agent.

The entrance of a diplomatic agent upon the exercise of his functions places him in full possession of a right of inviolability, of certain immunities from local jurisdiction, and of rights to ceremonial courtesy, which are conceded to him partly because the intercourse of states could not con-

veniently be carried on without them, and partly as a matter of respect to the person representing the sovereignty of his state. The right of inviolability primarily secures an envoy from all violence directed against him for political reasons, from being retained as a hostage, or kept as a prisoner of war; but it may also be regarded as the source of that personal immunity from the local jurisdiction which has been already discussed<sup>1</sup>, and it so imparts a character of peculiar gravity to offences committed against his person that they are looked upon by the state to which he is accredited as equivalent to crimes committed against itself. The nature and extent of the immunities enjoyed by diplomatic agents have been fully examined; and upon the ceremonial branch of his rights it is unnecessary to enlarge, because although the principle that due ceremonial respect must be given is included in international law, the particular observances, like those to which sovereigns are entitled, fall within the province of etiquette<sup>2</sup>.

Although diplomatic agents do not enter upon the exercise of their functions nor consequently into the full enjoyment of their rights until their reception has taken place, they are inviolable as against the state to which they are accredited while on their voyage to it; and after entering it before their formal reception, or, on being dismissed, until their departure from it, they have a right to all their immunities, their diplomatic character being sufficiently shown by their passports<sup>3</sup>.

<sup>1</sup> § 50.

<sup>2</sup> Those who take an interest in these 'graves riens,' which however have given rise to infinite disputes, may find them sufficiently or superfluously descanted upon in Moser (*Versuch*, vols. iii. and iv), De Martens (*Précis*, § 206-13), Klüber (§ 217-27), Heffter (§ 220-1). The Germans have treated the subject with exemplary seriousness, and the learning applicable to it has been so patiently exhausted in monographs upon special points that a treatise by Moser is devoted to an ambassador's 'Recht mit sechs Pferden zu fahren.'

On the right of inviolability, see Phillimore, ii. ch. iv-vi; De Martens, § 215; Bluntschli, § 191-3; Heffter, § 212; Calvo, § 515.

<sup>3</sup> Heffter, § 210; Calvo, § 453.

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CHAP. IX.

Termination of a mission.

The mission of a diplomatic agent is terminated by his recall, by his dismissal by the government to which he is accredited, by his departure on his own account upon a cause of complaint stated, by war or by the interruption of amicable relations between the country to which he is accredited and his own, by the expiration of his letter of credence, if it be given for a specific time, by the fulfilment of a specific object for which he may have been accredited, and in the case of monarchical countries by the death of the sovereign who has accredited him. There is some difference of opinion as to whether the death of a sovereign to whom an ambassador or minister is accredited in strictness necessitates a fresh letter of credence, but it is at least the common habit to furnish him with a new one; though the practice is otherwise when the form of government is republican. A like difference of opinion exists as to the consequences of a change of government through revolution, it being laid down on one hand that the relations between the state represented by a minister or other diplomatic agent and the new government may be regarded as informal or official at the choice of the parties, and on the other that a new letter of credence is not only necessary, but that the necessity is one of the distinctive marks separating the position of a diplomatist from that of a consul. Practice appears to be more in favour of the latter view. Letters of credence being personal, it is scarcely necessary to say that a diplomatic mission comes to an end by the death of the person accredited<sup>1</sup>.

Diplomatic agents in friendly states to which they are not accredited.

§ 99. The character of a diplomatic agent is not, like that of a sovereign, inseparable from his personality; unlike military and naval commanders, he has usually no functions except in the state to which he is accredited; there is no practical reason for his immunities, and he does not represent his country, except when he is actually engaged in his diplomatic business; he is therefore as a general rule destitute

<sup>1</sup> De Martens, *Précis*, § 238-42; Wheaton, *Elem.* pt. iii. ch. i. § 23-4; Heffter, § 223; Phillimore, ii. § ccxi; Bluntschli, § 227-40; Calvo, § 466-70.

of special rights or privileges in states to which he is not accredited as against the government or laws of that state; and there are cases in which a minister has been arrested for personal debts and other civil liabilities, and even in which he has been criminally punished while staying in or passing through the territory of a friendly power<sup>1</sup>. The case of negotiators at a congress or conference is exceptional. Though they are not accredited to the government of the state in which it is held, they are entitled to complete diplomatic privileges, they being as a matter of fact representative of their state and engaged in the exercise of diplomatic functions<sup>2</sup>.

PART II.  
CHAP. IX.

Diplomatic  
agents at  
a congress  
or con-  
ference.

§ 100. As a diplomatic agent in the employment of a hostile country is not only himself an enemy, but is likely from the nature of his functions to be peculiarly noxious, it is unquestionable that ministers or other agents accredited by their country to a state friendly to it may be seized and retained as prisoners of war by an enemy, if they come without permission within the jurisdiction of the latter, whether

Diplomatic  
agents  
found with-  
in enemy  
jurisdic-  
tion.

<sup>1</sup> De Martens, *Précis*, § 246-7; De Garden, *Traité de Diplomatie*, ii. 212; Heffter, § 207. Wheaton (*Elem. pt. iii. ch. i. § 20*) says that the opinion of jurists seems to be somewhat divided on the question of the respect and protection to which a public minister is entitled, in passing through the territories of a state other than that to which he is accredited. He starts with the assertion that an ambassador has a sacred character, and that a government in allowing him to enter its territories makes an implied promise to respect it. He acknowledges that Grotius (*De Jure Belli et Pacis*, lib. ii. c. 18. § 5), Bynkershoek (*De Foro Legatorum*, c. ix. § 7), and Wicquefort (*De l'Ambassadeur*, liv. i. § 29) are of a different opinion; Vattel (liv. iv. ch. vii. § 84), whom he quotes in support of his view, merely says that acts of violence must not be done or permitted against an ambassador which would be inconsistent with the protection due to an ordinary stranger, and expressly states that a diplomatic agent has no right to expect the full enjoyment of diplomatic privileges from the hands of a government to which he is not accredited. The only authority, in fact, whom Wheaton can adduce as taking the same view as himself is Merlin (*Repertoire*, tit. *Ministre Public*). That an ambassador has a generally sacred character by modern custom, and that he enters a state to which he is not accredited under an implied promise that he will be allowed to enjoy diplomatic privileges, are of course the very points which require to be proved by practice or by a consensus of opinion.

<sup>2</sup> Phillimore, ii. § clxxiv.

PART II. the state to which they are accredited be hostile or friendly  
 CHAP. IX. to that which effects the capture. The arrest of the Maréchal de Belleisle in 1744 constitutes a leading case on the subject. He was charged with an embassy from the court of France to that of Prussia, and on his way to Berlin he unwittingly touched the soil of Hanover, which country in conjunction with England was then at war with France. He was seized and sent to England as a prisoner of war. His arrest was not complained of as illegitimate either by himself or his government, and it has since been commonly cited as an example of legitimate practice<sup>1</sup>.

Diplomatic agents found by the enemy of the state to which they are accredited in the territory of the latter. § 101. On the other hand, if a diplomatic agent accredited to a country which is at war with another is found by the forces of the latter upon the territory of its enemy, he is conceded all the rights of inviolability which can come into existence as against a state having only military jurisdiction<sup>2</sup>. Whether his privileges extend further, and if so how much further, must probably be regarded as unsettled. The point has not been considered by publicists, and until lately, whether by accident or through the courtesy of belligerents, it has not presented itself in the form of a practical question.

Question as to their correspondence when within a besieged town. During the siege of Paris however it was partially raised by the conduct of the German authorities with reference to the correspondence of diplomatic representatives shut up in the besieged city. On the minister of the United States being refused leave to send a messenger with a bag of despatches to London, except upon condition that the contents of the bag should be unsealed, Mr. Fish directed the American

<sup>1</sup> Vattel, liv. iv. ch. vii. § 85; De Martens, Précis, § 247; Heffter, § 207; Moser, Versuch, iv. 120, or De Martens, Causes Cél. ii. 1. Phillimore (ii. § clxxv) while stating the existing rule suggests that 'the true international rule would be that the ambassador should be allowed in all cases the *jus transitus innoxii*,' meaning apparently that he should only be liable to be seized within an enemy's jurisdiction if he does acts of hostility there; in other words, he would compel a state to allow an ambassador to pass through it in order to negotiate an offensive alliance against it with a state on the further side. Fiore (iii<sup>e</sup> p<sup>te</sup>, ch. ix) takes much the same view.

<sup>2</sup> De Martens, Précis, § 247; Heffter, § 207.



minister at Berlin to protest against the act of the German commanders, and argued in a note, in which the subject was examined, that the right of legation, that is to say the right of a state to send diplomatic agents to any country with which it wishes to keep up amicable relations, is amply recognised by international law, that a right of correspondence between the government and its agent is necessarily attendant upon the right of legation, that such correspondence is necessarily confidential in its nature, that the right of maintaining it would be nullified by a right of inspection on the part of a third power, and finally that there is no trace of any special usage authorising a belligerent to place diplomatic agents in a besieged town on the same footing as ordinary residents by severing their communication with their own governments<sup>1</sup>.

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CHAP. IX.

Looking at the question from the point of view of strict legal right, it is not altogether clear that any good reason can be assigned for giving the interests of a state accrediting an agent priority over those of a belligerent. It is no doubt true that the right of legation is fully established. But the right of legation, primarily at least, is only a right as between the states sending and receiving envoys; in other words, it only secures to each of two states having relations with each other the opportunity of diplomatic intercourse with the other. Is there any sufficient reason for enlarging it to embrace a power of compelling third states to treat countries sending envoys as exercising a right which has priority over their own belligerent rights? Even in time of peace it has been seen that an ambassador can only claim his complete diplomatic immunities in the state to which he is accredited. His privileges in their full extent are dependent on the fact that he has business to transact with the power by whom the privileges are accorded. Wholly apart therefore from any question as to the effect of a

The general question.

<sup>1</sup> D'Angeberg, *Recueil des Traités, &c. concernant la guerre Franco-Allemande*, Nos. 756 and 783.



PART II. conflict between those privileges and urgent interests of a  
 CHAP. IX. belligerent, there is no presumption in favour of the existence  
 of an obligation on the part of the latter to grant more than personal inviolability. And if the existence of a conflict can be alleged, the case against the priority of ambassadorial rights over those of a belligerent becomes stronger. The rules of war dealing with matters in which such conflict occurs certainly do not presuppose that the rights of neutrals are to be preferred to those of belligerents; and the government of the United States itself, while in the very act of protesting against the right of communication between a state and its agents being subordinated to belligerent rights, admitted that 'evident military necessity' would justify a belligerent in overriding it. On the whole it seems difficult, in the absence of a special custom, to deny to belligerents the bare right of restricting the privileges of a minister, not accredited to them, within such limits as may be convenient to themselves, provided that his inviolability remains intact.

The question however assumes a different aspect if it is looked at from the point of view of the courtesy which a state may reasonably be expected to show to a friendly power. Diplomatic relations are a part of ordinary international life; there is no reason for supposing that their maintenance is inconsistent with amity towards the invading government; there is on the other hand every reason to suppose that their interruption may be productive of extreme inconvenience to its friend. To withhold any privileges which facilitate those relations, in the absence of suspicion of bad faith or of grave military reasons, is not merely to be commonly discourteous, it is to be ready to injure or imperil the serious interests of a friend without the existence of reasonable probability that any important interests of the belligerent will be remotely touched.

Officers in  
 command  
 of armed  
 forces of  
 the state.

§ 102. Officers in command of armed forces of the state when upon friendly territory possess certain privileges, which have been already defined, in virtue of their functions and

of the representative character of the force which is under them; and in time of war they have certain powers of control within an enemy's country and of making agreements with the enemy in matters incident to war, which will be mentioned in subsequent chapters<sup>1</sup>. To complete the view of their position, and of that of the members of forces under their command, it is only necessary to add that neither they, nor the members of such forces, are in any case amenable to the criminal or civil laws of a foreign state in respect of acts done in their capacity of agents for which they would be punishable or liable to civil process if such acts were done in their private capacity. Thus, when a state in the exercise of its right of self-preservation does acts of violence within the territory of a foreign state while remaining at peace with it, its agents cannot be tried for the murder of persons killed by them, nor are they liable in a civil action in respect of damage to property which they may have caused.

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CHAP. IX.

An incident which arose out of the case of the *Caroline*, mentioned in a previous chapter<sup>2</sup>, is of some interest with reference to this point. A person named McLeod, who had been engaged as a member of the colonial forces in repelling the attack made upon Canada from United States territory, and who consequently had acted as an agent of the British government, was arrested while in the State of New York in 1841 upon a charge of having been concerned in what was called the murder of one Durfee, who was killed during the capture of the *Caroline*. The British minister at Washington at once demanded his release, stating it to be 'well known that the destruction of the steamboat *Caroline* was a public act of persons in Her Majesty's service, obeying the orders of the superior authorities. That act therefore, according to the usages of nations, can only be the subject of discussion between the two national governments. It cannot be justly made the ground of legal proceedings in the United States against the individuals concerned, who were bound

Case of  
McLeod.

<sup>1</sup> § 55-6, and chap's. iv. and vii. of Part iii.

<sup>2</sup> § 84.

PART II. to obey the authorities appointed by their own government.'

CHAP. IX.

The matter being in the hands of the courts it was impossible for the government of the United States to release McLeod summarily. Its duties were confined to the use of every means to secure his liberation by the courts, and to seeing that no sentence improperly passed upon him was executed. Whether reasonable efforts were made to fulfil the first of these duties it is not worth while to discuss here; and fortunately McLeod, after being detained in prison for several months, was acquitted on his trial. The essential point for the present purpose is that Mr. Webster, Secretary of State in the latter portion of the time during which the affair lasted, acknowledged that 'the government of the United States entertains no doubt that, after the avowal of the transaction as a public transaction, authorised and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law, and the general usage of civilised states, to be holden personally responsible in the ordinary tribunals of law for their participation in it;' and that the year after an act was passed directing that subjects of foreign powers, if taken into custody for acts done or omitted under the authority of their state, 'the validity or effect whereof depends upon the law of nations,' should be discharged<sup>1</sup>.

Diplomatic agents not of publicly acknowledged character.

§ 103. A diplomatic agent secretly accredited to a foreign government is necessarily debarred by the mere fact of the secrecy with which his mission is enveloped from the full enjoyment of the privileges and immunities of a publicly accredited agent. He has the advantage of those only which are consistent with the maintenance of secrecy; that is to say, he enjoys inviolability and the various immunities attendant on the diplomatic character in so far as the direct action of the government is concerned. Thus his political inviolability is complete; as between him and the government his house has the same immunities as are possessed by

<sup>1</sup> Halleck, i. 430, and Ann. Register, 1841, p. 316.

the house of a publicly accredited minister ; and it may be presumed that no criminal process would be instituted against him where the state charges itself with the duty of commencing criminal proceedings. On the other hand, in all civil and criminal cases in which the initiative can be taken by a private person he remains exposed to the action of the courts<sup>1</sup>.

PART II.  
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§ 104. Commissioners for special objects are not considered so to represent their government, or to be employed in such functions, as to acquire diplomatic immunities. They are however held to have a right to special protection, and courtesy may sometimes demand something more. It would probably not be incorrect to say that no very distinct practice has been formed as to their treatment, contentious cases not having sufficiently arisen<sup>2</sup>.

Commis-  
sioners.

§ 105. Consuls are persons appointed by a state to reside in foreign countries, and permitted by the government of the latter to reside, for the purpose partly of watching over the interests of the subjects of the state by which they are appointed, and partly of doing certain acts on its behalf which are important to it or to its subjects, but to which the foreign country is indifferent, it being either unaffected by them, or affected only in a remote and indirect manner. Most of the duties of consuls are of the latter kind. They receive the protests and reports of captains of vessels of their nation with reference to injuries sustained at sea ; they legalise acts of judicial or other functionaries by their seal for use within their own country ; they authenticate births and deaths ; they administer the property of subjects of their state dying in the country where they reside ; they send home shipwrecked and unemployed sailors and other destitute persons ; they arbitrate on differences which are voluntarily brought before them by their fellow countrymen, especially

Their func-  
tions.

<sup>1</sup> De Martens, Précis, § 249 ; Heffter, § 222 ; De Garden, Traité de Dip. ii. 12.

<sup>2</sup> De Garden, Traité de Dip. ii. 13 ; Bluntschli, § 243.

Heffter (§ 222) considers that commissioners, &c. have a right to the 'prérogatives essentielles dues aux ministres publics.'

PART II. in matters relating to commerce, and to disputes which have  
 CHAP. IX. taken place on board ship; they exercise disciplinary jurisdiction, though not of course to the exclusion of the local jurisdiction, over the crews of vessels of the state in the employment of which they are; they see that the laws are properly administered with reference to its subjects, and communicate with their government if injustice is done; they collect information for it upon commercial, economical and political matters. In the performance of these and similar duties the action of a consul is evidently not international. He is an officer of his state to whom are entrusted special functions which can be carried out in a foreign country without interfering with its jurisdiction. His international action does not extend beyond the unofficial employment of such influence as he may possess, through the fact of his being an official and through his personal character, to assist compatriots who may be in need of his help with the authorities of the country. If he considers it necessary that formal representations shall be made to its government as to treatment experienced by them or other matters concerning them, the step ought in strictness to be taken through the resident diplomatic agent of his state,—he not having himself a recognised right to make such communications<sup>1</sup>. Thus he is not internationally a representative of his state, though he possesses a public official character, which the government of the country in which he resides recognises by sanctioning his stay upon its territory for the purpose of performing his duties; so that he has a sort of scintilla of an international character, sufficiently strong to render any outrage upon him

<sup>1</sup> By some Consular Conventions, e.g. those between the United States and Austria, 1870 (De Martens, *Nouv. Rec. Gén.* 2<sup>e</sup> Ser. i. 44), Austria and Portugal, 1873 (ib. 467), Germany and Russia, 1874 (ib. 233), and France and Russia, 1874 (ib. 618), the right is given of making representations to the local authorities not only for the protection of subjects of their state, but in the case of an infraction of any treaty, and of addressing themselves to the government itself, if attention is not paid to their representations whenever the diplomatic representative of their state is absent.

in his official capacity a violation of international law, and to give him the honorary right of placing the arms of his country upon his official house<sup>1</sup>. PART II.  
CHAP. IX.

A consul may either be a foreigner to the country within which he exercises his functions, and his office may be the only motive of his sojourn there, or he may be a foreigner who for purposes of commerce or other reasons lives in the state independently of his office, and has perhaps acquired a domicile there, or finally he may be a subject of the state in which he executes the functions of consul. In all cases he is appointed by a commission or patent, which is communicated to the government of the country where he is to reside. On its receipt by the latter government he is recognised by it through the issue of what is called an *exequatur* or confirmation of his commission, which enables him to execute the duties of his office, and guarantees such rights as he possesses in virtue of it. An *exequatur* usually consists in a letter patent signed by the sovereign, and countersigned by the minister of foreign affairs; but it is not necessarily conferred in so formal a manner; in Russia and Denmark the consul merely receives notice that he is recognised, and in Austria his commission is endorsed with the word '*exequatur*' and impressed with the imperial seal. The *exequatur* is not issued as of course, and it may be refused if the person nominated as consul is personally objectionable for any serious reason. Thus in 1869 the *exequatur* was refused by England to a certain Major Haggerty, an Irishman naturalised in the United States, who was known to have been connected with Fenian plots. Again, the *exequatur* may be revoked if the consul outsteps the limits of his functions, especially if he meddles in political affairs; and though revocation seldom takes place, it being the practice to give an opportunity of recalling the offending consul to the state

<sup>1</sup> Spain, which in several respects gives exceptional privileges to consuls, in this matter is less liberal than other countries. The arms of the consul's state may only be put up inside his house.

PART II. by which he has been nominated, a certain number of in-  
 CHAP. IX. stances have occurred in which the measure has been resorted  
 — to. Thus in 1834 the Prussian consul at Bayonne having helped in getting clandestinely into Spain supplies of arms for the Carlists, and his government having refused to recall him, his exequatur was withdrawn; in 1856 the exequatur of three English consuls in the United States were revoked on the ground of their alleged participation in attempts to recruit men for the British army during the Crimean War; the exequatur was withdrawn from an American citizen acting as consul at St. Louis for a foreign power for endeavouring to make use of his consular office to escape from military service during the Civil War; and in 1866 the consul for Oldenburg at New York was deprived of his exequatur for refusing to appear and give evidence before the Supreme Court in a cause to which he was one of the parties. So soon as the exequatur is revoked the person up to that time consul totally loses his official character.

Privileges. The functions of a consul being such as have been described, it being frequently the case that he is a subject of the state in which he exercises them, and the tenure of his office being dependent upon so formal a confirmation and continued permission on the part of that state, it is natural that he should not enjoy the same privileges as agents of a state employed in purely international concerns or representative of its sovereignty. As a general rule he is subjected to the laws of the country in which he lives to the same extent as persons who are of like status with himself in all points except that of holding the consular office. Consuls, the sole object of whose residence is the fulfilment of their consular duties, those who are chosen from among persons domiciled in the country, and those who are subjects of the state, are broadly in the same position respectively as other commorants, domiciled persons, and subjects. It is agreed however that the official position of a consul commands some ill-defined amount of respect

and protection; that he cannot be arrested for political reasons; that he has the specific privileges of exemption from any personal tax and from liability to have soldiers quartered in his house, and the right of putting up the arms of his nation over his door; and that he must be conceded whatever privileges are necessary to enable him to fulfil the duties of his office, except such as would withdraw him from the civil and criminal jurisdiction of the courts<sup>1</sup>,—it being understood to be implied in the consent given by the state to his appointment for the performance of certain duties that all reasonable facilities must be given for their fulfilment. These latter privileges appear to be reducible to inviolability of the archives and other papers in the consulate<sup>2</sup>, and to immunity from any personal obligations, weighing under the local law upon private persons, which are incompatible with a reasonably continuous presence of the consul at his consulate or with his ability to go wherever he may be called by his consular duty<sup>3</sup>. Thus it is held that consuls are exempt from serving on juries, because such employment implies absence, and may compel them to travel to some distance from their official residence; and as a matter of course they cannot be drawn for service in militia or even in a municipal guard. If possible also, a consul accused of a criminal offence ought to be set at

PART II.  
CHAP. IX.  
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<sup>1</sup> For obvious reasons a consul is not liable to the courts for acts done by order of the government from which he holds his commission.

<sup>2</sup> It is said by M. Calvo (§ 484) that the archives of the French consulate in London were seized and sold not many years ago for arrears of house tax payable by the landlord of the house occupied by the consulate; and it appears (Lawrence, *Rev. de Droit Int.* x. 317) that in 1857 the whole consular property in the United States consulate at Manchester, with flag, seal, arms, and archives, was seized for a private debt of the consul, and would have been sold if security had not been temporarily given by a private person, and if the American minister in London had not paid the amount due. A state of the law which permits consular archives to be sold is certainly not to be commended.

<sup>3</sup> The United States only claim this immunity for such of their consuls as are citizens of the United States and do not hold real estate or engage in business in the country to which they are sent. Regulations for the Consular Service of the United States, quoted in Halleck, i. 316.



**PART II.** liberty on bail, or be kept under surveillance in his own house,  
**CHAP. IX.** instead of being sent to prison, where the exercise of his functions is difficult or impossible. If a state consents to receive one of its own subjects as consul for a foreign country it consents in doing so to extend to him the same privileges as are due to consuls who are subjects of the foreign country or of third powers.

Position in  
 case of  
 change of  
 govern-  
 ment in the  
 country of  
 residence.

It follows from the absence of any political tinge in the functions of a consul that political changes in a state do not affect his official position, and that the nomination of a person for the performance of consular duties in a given territory does not imply that the government of that territory, if of contested legitimacy, is recognised by the state employing the consul. If the form of government of a state is changed, or if the place in which a consul resides is annexed to a state other than that from which he has received his *exequatur*, no new *exequatur* is required. The cases of consuls in the Confederate States, nominated upon the outbreak of the Civil War, who continued to exercise their functions during its progress, and that of the nomination of consuls by England to the various South American Republics eighteen months before the earliest recognition of any of them as a state, are instances of the dissociation of consular relations from any question of political recognition.

Considera-  
 tion due to  
 consular  
 house  
 during hos-  
 tilities.

When a place in which a consul is resident in time of war becomes the scene of actual hostilities, it is usual to hoist the flag of the state in the employment of which he is over the consular house; and the combatants become bound by a usage of courtesy, failure to observe which is peculiarly offensive, to avoid injuring it by their fire or otherwise, except in cases of actual military necessity, or when the enemy makes incontestible use of it as a cover for his own operations<sup>1</sup>.

<sup>1</sup> On the functions and privileges of consuls, see De Garden, *Traité de Dip.* i. 315; Phillimore, ii. § cclxvi-lxxi; Heffter, § 244-8; Bluntschli, § 244-75; Halleck, i. 310-30; Calvo, § 471-94; and especially Lawrence, *Rev. de Droit Int.* x. 285-338, and xi. 45-79.

Works devoted to the subject have been written by Miltitz (*Manuel des*

The persons employed as consuls are divided into consuls general, consuls, vice-consuls, and consular agents, a difference of official rank being indicated by the respective names. The division is not one of international importance.

PART II.  
CHAP. IX.

Consuls are sometimes accredited as *chargés d'affaires*. When such is the case their consular character is necessarily subordinated to their superior diplomatic character, and they are consequently invested with diplomatic privileges.

Consuls  
diploma-  
tically  
accredited.

§ 106. A state is responsible for, and is bound by, all acts done by its agents within the limits of their constitutional capacity or of the functions or powers entrusted to them. When the acts done are in excess of the powers of the person doing them the state is not bound or responsible; but if they have been injurious to another state it is of course obliged to undo them and nullify their effects as far as possible,

Responsi-  
bility of a  
state for  
acts done  
by its  
agents.

Consuls), Tuson (*The British Consul's Guide*), and De Clercq et de Vallat (*Guide Pratique des Consulats*).

Of late there has been a growing tendency to define the position of consuls by conventions. See those between France and Italy, 1862 (*De Martens, Nouv. Rec. Gén. 2<sup>e</sup> Ser. 631*), North German Confederation and Spain, 1870 (*Nouv. Rec. Gén. xix. 21*), Austria and the United States, 1870 (*Nouv. Rec. Gén. 2<sup>e</sup> Ser. i. 44*), United States and San Salvador, 1870 (*ib. 79*), Spain and Belgium (*id. ii. 134*), Spain and the Netherlands, 1871 (*ib. 27*), Germany and the United States, 1872 (*Nouv. Rec. Gén. xix. 21*), Austria and Portugal, 1873 (*Nouv. Rec. Gén. 2<sup>e</sup> Ser. i. 467*), Germany and Russia, 1874 (*ib. 233*), Austria and Italy, 1874 (*ib. 352*), France and Russia, 1874 (*ib. 618*), Russia and Italy, 1875 (*ib. 395*), Italy and the Netherlands, 1875 (*id. ii. 15*), Russia and Spain, 1876 (*ib. 549*). These conventions differ as to details, e.g. as to the way in which the evidence of consuls is to be procured by the courts, or as to the contraventions of the territorial law for which consuls can be arrested; but in the main they are practically identical, and represent, though with some enlargement, the privileges and functions with which consuls are invested by custom. The convention between Austria and the United States, which may serve as an example of the class, will be found in Appendix v.

Consuls in states not within the pale of international law enjoy by treaty exceptional privileges for the protection of their countrymen, without which the position of the latter would be precarious. These privileges properly find no place in works on international law, because they exist only by special agreement with countries which are incompetent to set precedents in international law. Information with respect to consuls in such states may be found in Phillimore, ii. § cclxxii-vii, Calvo, § 495-9, and the above-mentioned special works.

PART II. and, where the case is such that punishment is deserved,  
CHAP. IX. — to punish the offending agent. It is of course open to a state  
to ratify contracts made in excess of the powers of its agents,  
and it is also open to it to assume responsibility for other  
acts done in excess of those powers. In the latter case the  
responsibility does not commence from the time of the ratifi-  
cation, but dates back to the act itself.

## CHAPTER X.

### TREATIES.

§ 107. It follows from the position of a state as a moral being, at liberty to be guided by the dictates of its own will, that it has the power of contracting with another state to do any acts which are not forbidden, or to refrain from any acts which are not enjoined by the law which governs its international relations, and this power being recognised by international law, contracts made in virtue of it, when duly concluded, become legally obligatory<sup>1</sup>.

PART II.  
CHAP. X.  
—  
Division  
of the  
subject.

They may be conveniently considered with reference to—

1. The antecedent conditions upon which their validity depends.
2. Their forms.

<sup>1</sup> Contracts entered into between states and private individuals, or by the organs of states in their individual capacity, are of course not subjects of international law. Of this kind are—

1. Concordats, because the Pope signs them not as a secular prince, but as head of the Catholic Church.

2. Treaties of which the object is to seat a dynasty or a prince upon a throne, or to guarantee its possession, in so far as the agreement is directed to the imposition of the dynasty or prince upon the state for reasons other than strictly international interests, or to their protection against internal revolution, because such contracts are in the interest of the individuals in their personal capacity, and not in their capacity as representatives of the will of the state.

3. Agreements with private individuals, e.g. for a loan.

4. Arrangements between different branches of reigning houses, or between the reigning families of different states, with reference to questions of succession and like matters.

PART II.  
CHAP. X.  
—

3. Their interpretation.

4. Their effects.

5. Certain means of assuring their execution.

6. The conditions under which they cease to be obligatory.

7. Their renewal.

Antecedent conditions of the validity of a treaty.

§ 108. The antecedent conditions of the validity of a treaty may be stated as follows. The parties to it must be capable of contracting; the agents employed must be duly empowered to contract on their behalf; the parties must be so situated that the consent of both may be regarded as freely given; and the objects of the agreement must be in conformity with law.

Capacity to contract.

All states which are subject to international law are capable of contracting, but they are not all capable of contracting for whatever object they may wish. The possession of full independence is accompanied by full contracting power; but the nature of the bond uniting members of a confederation, or joining protected or subordinate states to a superior, implies either that a part of the power of contract normally belonging to a state has been surrendered, or else that it has never been acquired. All contracts therefore are void which are entered into by such states in excess of the powers retained by, or conceded to, them under their existing relations with associated or superior states<sup>1</sup>.

Possession of sufficient authority by the persons contracting on behalf of the state.

The persons to whom the conduct of foreign relations is delegated by the constitution of a state necessarily bind it by all contracts into which they enter on its behalf<sup>2</sup>. There are also persons who in virtue of being entrusted with the exercise of certain special functions have a limited power of binding it by contracts relating to matters within the sphere of their authority. Thus officers in command of naval or military forces may conclude agreements for certain purposes in time of war<sup>3</sup>. If such persons, or negotiators

<sup>1</sup> Bluntschli, § 403; Vattel, liv. ii. ch. xii. § 155; Calvo, § 579.

<sup>2</sup> Comp. § 97.

<sup>3</sup> For the limits of the powers of military and naval commanders, see Pt. iii.

accredited by the sovereign or the body exercising the general treaty-making power in a state, exceed the limits of the powers with which they are invested, the contracts made by them are null; but it is incumbent upon their state, when any act has been done by the other party in compliance with the agreement, or when any distinct advantage has been received from it, either to restore things as far as possible to the condition in which they previously were, or to give compensation, unless the contract made was evidently in excess of the usual powers of a person in the position of the negotiator, in which case the foreign state, having prejudiced itself by its own rashness, may be left to bear the consequences of its indiscretion<sup>1</sup>.

The freedom of consent, which in principle is held to be as necessary to the validity of contracts between states as it is to those between individuals, is understood to exist as between the former under conditions which would not be thought compatible with it where individuals are concerned. In international law force and intimidation are permitted means of obtaining redress for wrongs, and it is impossible to look upon permitted means as vitiating the agreement, made in consequence of their use, by which redress is provided for. Consent therefore is conceived to be freely given in international contracts, notwithstanding that it may have been obtained by force, so long as nothing more is exacted than it may be supposed that a state would consent to give, if it were willing to afford compensation for past wrongs and security against the future commission of wrongful acts. And as international law cannot measure what is due in a given case, or what is necessary for the protection of a state which declares itself to be in danger, it regards all compacts as valid, notwithstanding the use of force or intimidation,

Freedom  
of consent.

chap. viii. For certain cases in which local and other subordinate authorities appear to have powers in some countries to make agreements for particular purposes, see Bluntschli, § 442.

<sup>1</sup> Bluntschli, § 404-5 and 407; Heffter, § 84.

**PART II.** which do not destroy the independence of the state which has  
**CHAP. X.** been obliged to enter into them. When this point however  
 — is passed constraint vitiates the agreement, because it cannot be supposed that a state would voluntarily commit suicide by way of reparation or as a measure of protection to another. The doctrine is of course one which gives a legal sanction to an infinite number of agreements one of the parties to each of which has no real freedom of will; but it is obvious that unless a considerable degree of intimidation is allowed to be consistent with the validity of contracts, few treaties made at the end of a war or to avert one would be binding, and the conflicts of states would end only with the subjugation of one of the combatants or the utter exhaustion of both.

Effect of  
personal  
intimida-  
tion.

Violence or intimidation used against the person of a sovereign, of a commander, or of any negotiator invested with power to bind his state, stand upon a different footing. There is no necessary correspondence between the amount of constraint thus put upon the individual, and the degree to which one state lies at the mercy of the other, and, as in the case of Ferdinand VII at Bayonne, concessions may be extorted which are wholly unjustified by the general relations between the two countries. Accordingly all contracts are void which are made under the influence of personal fear.

**Of fraud.** Freedom of consent does not exist where the consent is determined by erroneous impressions produced through the fraud of the other party to the contract. When this occurs therefore;—if, for example, in negotiations for a boundary treaty the consent of one of the parties to the adoption of a particular line is determined by the production of a forged map, the agreement is not obligatory upon the deceived party<sup>1</sup>.

<sup>1</sup> Heffter, § 85; Klüber, § 143; Bluntschli, § 408-9. De Martens (Précis, § 50) regards consent as remaining free whenever the contract is not palpably unjust to the party, the freedom of whose consent is in question. The test of justice or injustice is evidently not a practical one. Phillimore (ii. xlix) well remarks that the obligation of international treaties concluded under the influence of intimidation is analogous to that of contracts entered into to avoid

The requirement that contracts shall be in conformity with PART II. CHAP. X. law invalidates, or at least renders voidable, all agreements Conformity with law. which are at variance with the fundamental principles of international law and their undisputed applications, and with the arbitrary usages which have acquired decisive authority. Thus a treaty is not binding which has for its object the subjugation or partition of a country, unless the existence of the latter is wholly incompatible with the general security; and an agreement for the assertion of proprietary rights over the open ocean would be invalid, because the freedom of the open seas from appropriation, though an arbitrary principle, is one that is fully received into international law. It may be added that contracts are also not binding which are at variance with such principles, not immediately applicable to the relations of states, as it is incumbent upon them as moral beings to respect. Thus a compact for the establishment of a slave trade would be void, because the personal freedom of human beings has been admitted by modern civilised states as a right which they are bound to respect and which they ought to uphold internationally.

§ 109. Usage has not prescribed any necessary form of Forms of contract. international contract. A valid agreement is therefore concluded so soon as one party has signified his intention to do or to refrain from a given act, conditionally upon the acceptance of his declaration of intention by the other party as constituting an engagement, and so soon as such acceptance is clearly indicated. Between the binding force of contracts which barely fulfil these requirements, and of those which are couched in solemn form, there is no difference. From the moment that consent on both sides is clearly established, by whatever means it may be shown, a treaty exists of which the obligatory force is complete<sup>1</sup>.

Thus sometimes, when conventional signs have a thoroughly or stop litigation, which are binding upon a party consenting only from fear of the expense and uncertain issue of a law-suit.

<sup>1</sup> De Martens, *Précis*, § 49; Klüber, § 143; Heffter, § 87; Phillimore, ii. § 1; Bluntschli, § 422.



PART II. understood meaning, a contract for certain limited purposes  
 CHAP. X. may even be made by signal. The exhibition of white flags,  
 — for example, by both of two hostile armies establishes a  
 truce<sup>1</sup>.

Generally of course international contracts are, as a matter of prudence, consigned to writing, and take the form of a specific agreement signed by both parties or by persons duly authorised on their behalf. Occasionally however consent is shown, and a treaty is consequently concluded, by edicts or orders in some other shape given to the subjects of the contracting powers, or by a declaration and answer<sup>2</sup>; frequently it is shown by an exchange of diplomatic notes.

Ratifica-  
 tion by the  
 supreme  
 power of  
 treaties  
 made by its  
 agents.

§ 110. Except when an international contract is personally concluded by a sovereign or other person exercising the sole treaty-making power in a state, or when it is made in virtue of the power incidental to an official station, and within the limits of that power, tacit or express ratification by the supreme treaty-making power of the state is necessary to its validity.

Tacit rati-  
 fication.

Tacit ratification takes place when an agreement, invalid because made in excess of special powers, or incomplete from want of express ratification, is wholly or partly carried out with the knowledge and permission of the state which it purports to bind; or when persons, such as ministers of state, who usually act under the immediate orders or as the mouth-piece in foreign affairs of the person or body possessing the treaty-making power, enter into obligations in notes or in any other way for which express ratification is not required by custom, without their action being repudiated so soon as it becomes known to the authority in fact capable of definitively binding the state<sup>3</sup>.

<sup>1</sup> De Martens, Précis, § 65; Bluntschli, § 422.

<sup>2</sup> e.g. Treaty of Commerce of 1785 between Austria and Russia by simultaneous edicts; De Martens, Rec. iv. 72 and 84.

<sup>3</sup> Wheaton, Elem. pt. iii. ch. ii. § 4; Halleck, i. 230. The writers who say that ratification cannot be inferred from silence are evidently thinking of conventions concluded in excess of specific powers, and not of agreements

Express ratification, in the absence of special agreement to the contrary, has become requisite by usage whenever a treaty is concluded by negotiators accredited for the purpose. The older writers upon international law held indeed that treaties, like contracts made between individuals through duly authorised agents, are binding within the limits of the powers openly given by the parties negotiating to their representatives, and that consequently where these powers are full the state is bound by whatever agreement may be made in its behalf<sup>1</sup>. But it was always seen by statesmen that the analogy is little more than nominal between contracts made by an agent for an individual and treaties dealing with the complex and momentous interests of a state, and that it was impossible to run the risk of the injury which might be brought upon a nation through the mistake or negligence of a plenipotentiary. It accordingly was a custom, which was recognised by Bynkershoek as forming an established usage in the early part of last century, to look upon ratification by the sovereign as requisite to give validity to treaties concluded by a plenipotentiary; so that full powers were read as giving a general power of negotiating subject to such instructions as might be received from time to time, and of concluding agreements subject to the ultimate decision of the sovereign<sup>2</sup>. Later writers may declare that by the law of nature the acts of an agent bind his state so long as he has not exceeded his public commission, but they are obliged to add that the necessity of ratification is recognised by the positive law of nations<sup>3</sup>.

The necessity of ratification by the state may then be which are practically within the powers of the persons making them, but which are not technically binding from the moment of their conclusion, owing to the signatories not being the persons in whom the treaty-making power of the state is theoretically lodged by constitutional law.

<sup>1</sup> This opinion appears still to meet with a certain amount of support; see Phillimore (ii. § lii), who relies on Klüber (§ 142). Heffter thinks that a state is morally bound in such cases (§ 87).

<sup>2</sup> Quæst. Jur. Pub. lib. ii. c. vii.

<sup>3</sup> Vattel, liv. ii. ch. xii. § 156; De Martens, Précis, § 48.

PART II.  
CHAP. X.

Ratifica-  
tion not to  
be refused  
except for  
solid rea-  
sons.

taken as practically undisputed, and the reason for the requirement is one which prevents it from being given as a mere formality. Ratification may be withheld; and perhaps in strict law it is always open to a state to refuse it<sup>1</sup>. Morally however, if not legally, it cannot be arbitrarily withheld. The right of refusal is reserved, not simply to give an opportunity of reconsideration, but as a protection to the state against betrayal into unfit agreements. Its exercise therefore must be prompted by solid reasons. It is agreed, for example, that a state is not bound if a plenipotentiary exceeds his instructions; and a right of refusal must also be held to exist if the new treaty conflicts with anterior obligations, if it is found to be incompatible with the constitutional law of one of the contracting states, if a sudden change of circumstances occurs at the moment of signing it, by which its power to accomplish its object is nullified or seriously impaired, or if an error is discovered with respect to facts, a correct knowledge of which would have prevented the acceptance of the treaty in its actual form<sup>2</sup>. M. Guizot went further when defending the French government for refusing, in consequence of the opposition of the Chambers, to ratify a treaty made in 1841 for the suppression of the slave trade. 'Ratification,' he maintained, 'is a real and substantive right; no treaty is complete without being ratified; and if, between the conclusion and the ratification, important facts come into existence—new and evident facts—which change the relations of the two powers and the circumstances amidst which the treaty is concluded, a full right of refusal exists.' Wide as is the discretion which the language of M. Guizot gives to a state, it probably corresponds better with the necessities of the case than any doctrine which, in affecting to indicate the occasions, or the sort of occasions, upon which ratification

<sup>1</sup> Bluntschli at least adopts this view expressly (§ 420), and most writers treat the limitations upon the right of refusal as questions rather of morals than of law.

<sup>2</sup> Wheaton, Elem. pt. iii. ch. ii. § 5; Calvo, § 589.

may be refused, tacitly excludes cases which are not analogous to those mentioned. With the complicated relations of modern states the reasons which may justify a refusal to ratify a treaty are too likely to be new for it to be safe to attempt to enumerate them. A state must be left to exercise its discretion, subject to the restraints created by its own sense of honour, and the risks to which it may expose itself by a wanton refusal.

Exceptions to the rule that ratification ought not to be refused, except for solid reasons coming into existence or discovered after the signature of the treaty, occur when by the constitution of a state it is essential to the validity of a treaty concluded by plenipotentiaries duly instructed by the appropriate persons that it shall be sanctioned by a body, such as the Senate in the United States, which is not necessarily even cognisant of the instructions given to the negotiators, and when, the control of expenditure or the legislative power not being in the hands of the person or persons invested with the treaty-making power, the treaty includes financial clauses or requires legislative changes. In such cases, since the different agents of a state bind it only within the limits of their constitutional competence, and since it is the business of the state with which a contract is made to take reasonable care to inform itself as to the competence of those with whom it negotiates, it is an implied condition of negotiations that an absolute right of rejecting a treaty is reserved to the body the sanction of which is needed or in which financial or legislative power resides, and that the discretion of this body is not confined within the bounds which are morally obligatory under other forms of constitution<sup>1</sup>.

It is now the practice to make an express reservation of the right of ratification either in the full powers given to the negotiators or in the treaty itself. A reservation of this kind is however of no legal value, because it does not enlarge the rights which a state already possesses in law.

<sup>1</sup> Wheaton, Elem. pt. iii. ch. ii. § 6; Calvo, § 593-4; Bluntschli, § 413.

## PART II.

## CHAP. X.

Effect of  
provision  
that a  
treaty shall  
take effect  
without ra-  
tification.

An exception to the requirement that a treaty shall be ratified by the contracting states is said to occur when, as was the case with the Convention of July 1840 between Austria, Great Britain, Prussia, Russia, and Turkey, for the pacification of the Levant, it is expressly provided that the preliminary engagements shall take effect immediately without waiting for an interchange of ratifications<sup>1</sup>. It is difficult to see in what way a treaty of this kind can constitute an exception. The plenipotentiaries who sign it, unless they act under a previous enabling agreement between their states, have no more power to debar their respective governments from the exercise of their legal rights than they have to bind them finally for any other purpose. The treaty is properly a provisional one, which, if carried into effect, receives a tacit ratification by the execution of its provisions.

Completion  
of ratifica-  
tion.

Ratification is considered to be complete only when instruments containing the ratifications of the respective parties have been exchanged. So soon as this formality has been accomplished, and not until then, the treaty comes into definite operation. But, in the absence of express agreement, effects which are capable of being retroactive, such as the imposition of national character upon ceded territory, are so to the date of the original signature of the treaty, instead of commencing from the time of the exchange of ratifications, and stipulations, the execution of which during the interval between signature and ratification has been expressly provided for, must be carried out subject to a claim which the party burdened by them may make to be placed in his original position, or to receive compensation if the treaty be not ratified by the other contracting state; because if the stipulations are not carried out, their neglect will be converted into an infraction of the treaty so soon as its ratification is effected<sup>2</sup>.

<sup>1</sup> Wheaton, Elem. pt. iii. ch. ii. § 5; Twiss, i. § 233.

<sup>2</sup> Bluntschli, § 421; Heffter, § 87. Occasionally exceptions are made by agreement to the practice of making the effect of a treaty date from the time of the signature. The Treaty of Paris in 1856 dated from the moment of ratification.

§ 111. Publicists are generally agreed in laying down certain rules of construction as being applicable when disagreement takes place between the parties to a treaty as to the meaning or intention of its stipulations. Some of these rules are either unsafe in their application or of doubtful applicability; and rules tainted by any shade of doubt, from whatever source it may be derived, are unfit for use in international controversy. Those against which no objection can be urged, and which are probably sufficient for all purposes, may be stated as follows:—

1. When the language of a treaty, taken in the ordinary meaning of the words, yields a plain and reasonable sense, it must be taken as intended to be read in that sense, subject to the qualifications, that any words which may have a customary meaning in treaties differing from their common signification must be understood to have that meaning, and that a sense cannot be adopted which leads to an absurdity, or to incompatibility of the contract with an accepted fundamental principle of law.

A celebrated case, illustrating the operation of this rule, is that of the difference between England and Holland in 1756 as to the meaning of the treaties of guarantee of 1678, 1709, 1713, and 1717, the last-mentioned of which was renewed by the Quadruple Alliance of 1718 and by the Treaty of Aix la Chapelle in 1748. By these treaties England and Holland guaranteed to each other all their rights and possessions in Europe against 'all kings, princes, republics and states,' and specific assistance was stipulated if either should 'be attacked or molested by hostile act, or open war, or in any other manner disturbed in the possession of its states, territories, rights, immunities, and freedom of commerce.' On assistance being demanded by England from Holland, the latter power, which was unwilling to give it, argued that the guarantee applied only to cases in which the state in want of help was in the first instance the attacked and not the attacking party in the war, and alleged that England

PART II.  
CHAP. X.

Treaties to  
be inter-  
preted,

1. Accord-  
ing to their  
plain sense.

Difference  
between  
England  
and Hol-  
land in  
1756.

PART II. was in fact the aggressor. It was also argued that even if  
 CHAP. X.  
 — France were the aggressor in Europe, her aggressions there were only incidents of a state of war which had previously arisen in America, to hostilities on which continent the treaties did not apply. In taking up these positions the Dutch government assumed that the guarantee which it had given would be incompatible with international law if it were understood as covering instances of attack upon the territories of the guaranteed powers arising out of an aggression made by the latter; and it consequently held that the language of the treaties into which it had entered must be construed in some other than its plain sense. The assumption made by Holland was at variance with one of the principles upon which international law rests, and necessarily rests. As has been already said, the causes of war are generally too complex, and it is usually too open to argument whether an attack is properly to be considered aggressive or defensive, for the question whether a war is just or unjust to be subjected to legal decision. Accordingly both parties in all wars occupy an identical position in the eye of the law. The assumption of the Dutch being indefensible, all justification of their conduct fell to the ground; for Mr. Jenkinson, in his 'Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations,' had no difficulty in showing that the bare words of the treaties, if uncontrolled by any principle of international law, could only be reasonably understood to refer to attacks made at any time in the course of a war, the expressions used being perfectly general<sup>1</sup>.

Clayton-  
Bulwer  
Treaty.

A later case, in which it was necessary to reaffirm the rudimentary principle that effect is to be given to the plain meaning of the language of a treaty when a plain meaning exists, is that of the Clayton-Bulwer Treaty of 1850. By that treaty the government of Great Britain and the United

<sup>1</sup> Jenkinson's Treaties, Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations.

States declared 'that neither one nor the other will ever . . . occupy, or fortify, or colonise, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast or any part of Central America, nor will either make use of any protection which either affords, or may afford, or any alliance which either has, or may have, to or with any state or people for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying or colonising Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America, or of assuming or exercising dominion over the same.' Under the terms of this engagement the United States called upon England to abandon a protectorate over the Mosquito Indians, which she had exercised previously to the date of the treaty, urging that the Indians being a savage race a 'protectorate must from the nature of things be an absolute submission of these Indians to the British government, as in fact it has ever been.' Lord Clarendon met the demand by referring to the principle that 'the true construction of a treaty must be deduced from the literal meaning of the words employed in its framing,' and pointed out that the 'possibility' of protection is clearly recognised, so that the intention of the parties to the arrangement must be taken to be 'not to prohibit or abolish, but to limit and restrict such protectorate.' The whole of the words in fact limiting the use which could be made of a protectorate must have been excised before the interpretation contended for by the American government could become matter for argument<sup>1</sup>.

2. When the words of a treaty fail to yield a plain and reasonable sense they should be interpreted in such one of the following ways as may be appropriate:—

a. By recourse to the general sense and spirit of the treaty as shown by the context of the incomplete, improper, ambiguous, or obscure passages, or by the provisions of the instrument as a whole. This is so far an exclusive, or rather a controlling method, that if the result afforded by it is

2. When a plain sense is wanting, according to their spirit, or

<sup>1</sup> De Martens, Rec. Gén. ii. 219-39.



PART II. incompatible with that obtained by any other means except  
 CHAP. X. proof of the intention of the parties, such other means must  
 necessarily be discarded ; there being so strong a presumption  
 that the provisions of a treaty are intended to be harmonious,  
 that nothing short of clear proof of intention can justify any  
 interpretation of a single provision which brings it into col-  
 lision with the undoubted intention of the remainder.

their rea-  
 sonable  
 sense.

β. By taking a reasonable instead of the literal sense of words when the two senses do not agree. It was stipulated, for example, by the Treaty of Utrecht that the port and fortifications of Dunkirk should be destroyed, '*nec dicta munitamenta, portus, moles, aut aggeres, denuo unquam reficiantur.*' It was evident that England required the destruction of Dunkirk not because of any feeling with regard to the particular port and fortification in themselves, but because her interests were affected by the existence of a defensible place of naval armament immediately opposite the Thames ; the particular form of words chosen was obviously adopted only because an attempt to avoid the obligations of the treaty by the creation of a new place in a practically identical spot was not anticipated by the English negotiators. When therefore France, while in the act of destroying Dunkirk in obedience to her engagements, began forming a larger port, a league off, at Mardyck, England objected to the construction put upon the language of the treaty as being absurd. The French government in the end recognised that the position which it had taken up was untenable, and the works were discontinued <sup>1</sup>.

3. So as to  
 give what  
 is necessary  
 to the en-  
 joyment  
 of things  
 granted by  
 them.

3. Every right or obligation which is necessarily attendant upon something clearly ascertained to be agreed to in the treaty, including a right to whatever may be necessary to the enjoyment of things granted by it, is understood to be tacitly given or imposed by the gift or imposition of that upon which it is attendant <sup>2</sup>.

<sup>1</sup> Phillimore, ii. § lxxiii.

<sup>2</sup> On the whole subject of the interpretation of treaties see Grotius, De Jure

§ 112. When a conflict occurs between different provisions of a treaty or between different treaties, the provision or treaty to which preference is to be given is determined by the following rules:—

PART II.  
CHAP. X.

Interpreta-  
tion of con-  
flicting a-  
greements.

1. A generally or specifically imperative provision takes precedence of a general permission. Thus if a treaty concedes a right of fishing over certain territorial waters, and at the same time prohibits the persons to whom permission is given from landing to dry or cure the fish which may be caught, the prohibition outweighs the permission, notwithstanding that the power of curing and drying on the spot may be found to be so essential to the enjoyment of the fishing that the right to fish is nullified by its absence.

2. On the other hand, a special permission takes precedence of a general imperative provision; that is to say, if a treaty contains an agreement couched in general terms, and also an agreement with regard to a particular matter which if allowed to operate will act as an exception from the former agreement, effect is given to the exception.

3. If a penalty for non-observance is attached to one of two prohibitory stipulations and not to the other, or if a more severe penalty is attached to one than the other, preference is given to that which is the better guarded. If a penalty is attached to neither, the stipulation has precedence which has the more precision in its command.

4. When stipulations are of identical nature, that is to say when both are general and prohibitory or special and imperative, &c., and no priority can be ascribed to either upon the grounds mentioned in the last rule, that which is the

*Belii et Pacis*, lib. ii. cap. xvi; *Vattel*, liv. ii. ch. xvii; *Heffter*, § 95; *Phillimore*, ii. ch. viii; *Calvo*, § 579-607.

Besides the above rules of interpretation many others are usually given, which scarcely seem to be of much practical use in international law. They are mainly rules of interpretation of Roman law, which appear to have been imported into international law without a very clear conception of the manner in which they can be supposed to be applicable. There is no place for the refinements of the courts in the rough jurisprudence of nations.

PART II. more important must be observed by the party obliged,  
 CHAP. X. unless the promisee, who is at liberty to choose that the  
 — less important stipulation shall be performed, exercises his  
 power of choice in that direction.

5. When two treaties made between the same states at different dates conflict, the later governs, it being supposed to be in substitution for the earlier contract. It is hardly an exception from this rule that when of two conflicting treaties the later is made by an inferior though competent authority, the earlier is preferred. In the year 1800, for example, Piacenza was surrendered with its garrison to the French by the Austrian commandant, who from the nature of his command had authority to conclude an agreement of the kind made. The surrender took place at three in the afternoon, and at eight in the morning of the same day a convention had been concluded between generals Berthier and Melas, under which the whole Austrian forces were to retire behind the Mincio, giving over Piacenza to the French, but withdrawing the garrison. It was claimed and at once admitted that the latter convention ought to be carried out to the exclusion of the former<sup>1</sup>.

6. When two treaties conflict which are made with different states at different times, the earlier governs, it being of course impossible to derogate from an engagement made with a particular person by a subsequent agreement with another person entered into without his consent. Hence until all the parties to a treaty have consented to forego their rights under it, no subsequent treaty incompatible with it can be valid; any such treaty is null at least to the extent of its direct incompatibility; and if the incompatible portions are not separable from the remainder, it is null in its entirety<sup>2</sup>. Thus when Russia, in 1878, concluded with Turkey

<sup>1</sup> Corresp. de Nap. i. vi. 365.

<sup>2</sup> Grotius, lib. ii. cap. xvi. § 29; Vattel, liv. ii. ch. xvii. § 312-22; Phillimore, ii. ch. ix; Calvo, § 604-7.

M. Bluntschli (§ 414) says that '*les traités de ce genre ne sont pas nuls d'une manière absolue, mais seulement d'une manière relative. Ils conservent*

the Treaty of San Stefano, 'every material stipulation of which involved a departure from the treaty of 1856,' that is to say, from a treaty to which not only Russia and Turkey, but England, France, Austria, Prussia and Sardinia were parties, the later treaty was void as against the last-mentioned powers, or the states legally representing them<sup>1</sup>.

§ 113. A kind of treaty which demands a few words of separate notice on account of its special characteristics is a treaty of guarantee. Treaties of guarantee are agreements through which powers engage, either by an independent treaty to maintain a given state of things, or by a treaty or provisions accessory to a treaty, to secure the stipulations of the latter from infraction by the use of such means as may be specified or required against a country acting adversely to such stipulations.

Guarantees may either be mutual, and consist in the assurance to one party of something for its benefit in consideration of the assurance by it to the other of something else to the advantage of the latter, as in the Treaty of Tilsit, by which France and Russia guaranteed to each other the integrity of their respective possessions; or they may be undertaken by one or more powers for the benefit of a third, as in the treaty of the 15th April, 1856, by which England, Austria, and France guaranteed 'jointly and severally the independence and the integrity of the Ottoman Empire, recorded in the treaty concluded at Paris on the 30th March;'

*toute leur efficacité lorsque l'état dont les droits antérieurs sont lésés, ne s'oppose pas aux modifications amenées par le traité.* It is difficult to understand this doctrine. Two incompatibles cannot co-exist. One or other of the treaties, in so far as they are incompatible with one another, must be destitute of binding force. Either the second treaty has abrogated the first or the first alone is operative. It is granted that the second treaty has not abrogated the first; it therefore has no efficacy to keep. It can only acquire validity when all the parties with whom a contract was made in the first treaty give their consent to the abrogation of the latter, and it must date as a contract from that moment.

<sup>1</sup> De Martens, *Nouv. Rec. Gén.* 2<sup>e</sup> Sér. iii. 246 and 259.

PART II. or finally they may be a form of assuring the observance of  
 CHAP. X. an arrangement entered into for the general benefit of the contracting parties, as in the treaties of 1831 and 1839, by which Belgium was constituted an independent and neutral state in the common interests of the contracting powers, and while placed under an obligation to maintain neutrality received a guarantee that it should be enabled to do so, or in the treaty of November, 1855, by which Sweden and Norway engaged not to cede or exchange with Russia, nor to permit the latter to occupy any part of the territory belonging to the crowns of Sweden and Norway, nor to concede any right of pasturage or fishery or other rights of any nature whatsoever, in consideration of a guarantee by England and France of the Swedish and Norwegian territory<sup>1</sup>. In the two former cases a guarantor can only intervene on the demand of the party or, where more than one is concerned, of one of the parties interested, because the state in favour of which the guarantee has been given is the best judge of its own interests, and as the guarantee purports to have been given solely or at least primarily for its benefit, no advantage which may happen to accrue to the guaranteeing state from the arrangements to the preservation of which the guarantee is directed can invest the latter power with a right to enforce them independently. In the last-mentioned case, on the other hand, any guarantor is at liberty to take the initiative, every guaranteeing state being at the same time a party primarily benefitted.

When a guarantee is given by a single state or by two or more states severally, or jointly and severally, it must be acted upon at the demand of the country benefitted unless such action would constitute a clear infraction of the universally recognised principles and rules of international law, unless it would be inconsistent with an engagement previously entered into with another power, or unless the

<sup>1</sup> De Martens, *Rec.* viii. 642; Hertslet, *Map of Europe by Treaty*, 863, 870, 981, 983, 1241, 1281.

circumstances giving rise to the call upon the guaranteeing power are of the nature of internal political changes;—a guarantee given to a particular dynasty, for example, is good only against external foes and not against the effects of revolution at home, unless the latter object be specifically mentioned, and then only subject to the limitations before mentioned. It need scarcely be added that the fulfilment of the guarantee must be possible <sup>1</sup>.

When a guarantee is given collectively by several powers the extent of their obligation is not quite so certain. M. Bluntschli lays down that they are bound, upon being called upon to act in the manner contemplated by the guarantee, to examine the affair in common for the purpose of seeing whether a case for intervention has arisen, and to agree if possible upon a common conclusion and a common action; but that if no agreement can be arrived at, each guarantor is not only authorised but bound to act separately according to his view of the requirements of the case. A very different doctrine was put forward by Lord Derby in 1867 when explaining in the House of Commons the opinion held by the English government as to the nature of the obligations undertaken by it in signing the Luxemburg convention of that year. According to him a collective guarantee means, 'that in the event of a violation of neutrality all the powers who have signed the treaty may be called upon for their collective action. No one of those powers is liable to be called upon to act singly or separately. It is a case so to speak of limited liability. We are bound in honour—you cannot place a legal construction upon it—to see in concert with others that these arrangements are maintained. But if the other powers join with us it is certain that there will be no violation of neutrality. If they, situated exactly as

<sup>1</sup> Vattel, liv. ii. ch. xvi. § 235-9; Klüber, § 157-9; Twiss, i. § 231; Phillimore, ii. ch. vii; Bluntschli, § 430-41. Sir R. Phillimore thinks that a guarantee 'contra quoscunque' obliges to assistance against rebellion. M. Bluntschli considers that a guarantee falls to the ground when it is irreconcilable with 'les progrès du droit international.'

PART II. we are, decline to join, we are not bound single-handed to  
 CHAP. X. make up the deficiency. Such a guarantee has obviously  
 rather the character of a moral sanction to the arrangements  
 which it defends than that of a contingent liability to make  
 war. It would no doubt give a right to make war, but  
 would not necessarily impose the obligation <sup>1</sup>. It is in favour  
 of the latter construction that a collective guarantee must be  
 supposed to be something different from a several, or a joint  
 and several, guarantee, and that if it imposes a duty of  
 separate intervention in the last resort it is not very evident  
 what distinction can be drawn between them. On the other  
 hand, a guarantee is meaningless if it does no more than  
 provide for common action under circumstances in which the  
 guaranteeing powers would act together apart from treaty,  
 or for a right of single action under circumstances which  
 would provoke such action as a matter of policy. The only  
 objects of a guarantee are to secure that action shall be taken  
 under circumstances in which a state might not move for  
 its own sake, and to prevent other states from disregarding  
 the arrangement, or attacking the territory, guaranteed by  
 holding up to them the certainty that the force of the  
 guaranteeing powers will be employed to check them. On  
 the construction given to a collective guarantee by Lord  
 Derby neither end would be attained. Whichever view be  
 adopted the word collective is inconvenient. If it imposes a  
 duty, the extent of the duty is not at least clearly defined.  
 If it can be held to prevent a duty from being imposed, it  
 would be well to abstain from couching agreements in terms  
 which may seriously mislead some of the parties to them, or to  
 avoid making agreements at all which some of the contract-  
 ing parties may intend from the beginning to be illusory.

Effects of  
 treaties  
 1. upon the  
 contracting  
 parties ;

§ 114. The effect of an international contract is primarily  
 to bind the parties to it by its provisions, either for such  
 time as is fixed, if it be made for a definite period, or until  
 its objects are satisfied, or indefinitely if its object be the

<sup>1</sup> Bluntschli, § 440 ; Hansard, 3rd Ser. clxxxvii. 1922.

infinite repetition of certain acts, or the setting up once for all of a permanent state of things. In all cases the continuance of the obligation is dependent upon conditions which will be mentioned later.

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CHAP. X.

In a secondary manner the due conclusion of an international contract also affects third parties. A state of things has come into existence which, having been legally created in pursuance of the fundamental rights of states, other countries are bound to respect, unless its legal character is destroyed by the nature of its objects, or unless it is evidently directed, whether otherwise legally or not, against the safety of a third state, and except in so far as it is inconsistent with the rights of states at war with one another. So long therefore as a contract is in accordance with law, or consistent with the safety of states not parties to it, the latter must not prevent or hinder the contracting parties from carrying it out.

2. upon  
third  
parties.

§ 115. It was formerly the habit to endeavour to increase the security for the observance of treaties, offered by the pledged word of the signatories, by various means, which have now almost wholly fallen into disuse. Three only have at all been employed in relatively modern times, viz. the taking of hostages, the occupation of territory, and guarantee by a third power.

Modes of  
assuring  
execution  
of treaties.

The Treaty of Aix la Chapelle in 1748 was the last occasion upon which hostages were given to secure the performance of any agreement other than a military convention. Anything which requires to be said about hostages may therefore be postponed until conventions of the latter kind come under notice.

A guarantee by a third power is only one form of the treaties of guarantee, which have already been noticed.

Occupation of territory was formerly often used as a mode of taking security for the payment of debts for which the territory occupied was hypothecated. In such cases the territory occupied becomes the property of the creditor if



**PART II.** a term fixed for repayment of the debt passes without the  
**CHAP. X.** claim being satisfied, or if possession, as in the case of Orkney and Shetland, which were mortgaged by Denmark to Scotland in 1469, has been retained long enough for a title by prescription to be set up. In recent times occupation of territory by way of security for the payment of a debt has taken place only when the victor in a war has retained possession of part of his enemy's country until payment of the sum levied for war expenses, and occupation to compel the fulfilment of stipulations of other kinds has also occurred only as part of the arrangements consequent upon the conclusion of peace<sup>1</sup>.

**Extinction of treaties.** § 116. International contracts are extinguished when their objects are satisfied or when a state of things arises through which they become void, and they temporarily or definitively cease to be obligatory when a state of things arises through which they are suspended or become voidable<sup>2</sup>.

**1. When their objects are satisfied.** The object of a treaty is satisfied if, as sometimes happens with treaties of commerce, it has been concluded for a fixed time, so soon as the period which has been fixed has elapsed, or if it has been concluded irrespectively of time, so soon as the acts stipulated in it have been performed. A treaty, for example, by which one state engages to pay another a sum of money, as compensation for losses endured by the subjects of the latter through illegal conduct of the former, is satisfied on payment being made; and an alliance between two states for the purpose of imposing specified terms upon a third is satisfied when a treaty has been concluded by which those terms are imposed.

It may at first seem to be an exception to this rule, though it is not so in reality, that a treaty is not extinguished when the acts contemplated by it, though done once for all, leave legal obligations behind them. If a treaty stipulates for the cession of territory or the recognition of a

<sup>1</sup> Klüber, § 155-6; Phillimore, ii. § liv-v; Bluntschli, § 428; Calvo, § 592.

<sup>2</sup> For the effect of war in extinguishing and suspending treaties, see pt. iii. chap. i.

new state, the act of cession or of recognition is no doubt complete in itself; but the true object of the treaty is to set up a permanent state of things, and not barely to secure the performance of the act which forms the starting-point of that state; the ceding or recognising country therefore remains under an obligation until the treaty has become void or voidable in one of such of the ways to be indicated presently as may be applicable to it<sup>1</sup>.

A treaty becomes void—

1. By the mutual consent of the parties, shown either tacitly by the conclusion of a new treaty between them which is inconsistent with that already existing, or expressly by declaration of its nullity<sup>2</sup>.

PART II.  
CHAP. X.

2. When they become void.

2. By express renunciation by one of the parties of advantages taken under it.

3. By denunciation, when the right of denunciation has been expressly reserved.

4. By execution having become impossible, as, for example, if a state is bound by an offensive and defensive alliance with both of two states which engage in hostilities with one another.

5. When an express condition upon which the continuance of the obligation of the treaty is made to depend ceases to exist.

6. By incompatibility with the general obligations of states, when a change has taken place in undisputed law or in views universally held with respect to morals. If, for example, it were found that, by successive renewals of treaties and incorporations of treaties in others subsequently made,

<sup>1</sup> Calvo, § 550. Most writers content themselves with saying that treaties of the above kind are perpetual, without mentioning any reason for their being so.

<sup>2</sup> The former mode of showing mutual consent is of course frequent; of the latter the Treaty of Paris of 1814 is an example, the treaties of Presburg and Vienna between France and Austria, and those of Basle and Tilsit between France and Prussia, having been declared by it to be null. Hertalet, *Map of Europe by Treaty*, 22 and 25.

PART II. an agreement to allow a state certain privileges in importing  
 CHAP. X. slaves into the territory of the other contracting power was  
 still subsisting, it might fairly be treated as void, and as  
 not protecting subjects of the former state who might en-  
 deavour to introduce slaves in accordance with its terms<sup>1</sup>.

3. When  
 they  
 become  
 voidable.

Up to this point it has not been difficult to state the conditions under which treaties cease to be binding. They resume themselves into impossibility of execution, consent of the parties, either present or anticipatory in view of foreseen contingencies, satisfaction of the object of the compact, and incompatibility with undisputed law and morals. With regard to such causes of nullity there can be no room for disagreement, and little for the exercise of caution. It is less easy to lay down precisely the conditions under which a treaty becomes voidable; that is to say, under which one of the contracting parties acquires the right of declaring itself freed from the obligation under which it has placed itself. A clear principle is ready to hand, which, if honestly applied, would generally furnish a sufficient test of the existence or non-existence of the right in a particular case; but modern writers, it would seem, are more struck by the impossibility of looking at international contracts as perpetually binding, than by the necessity of insisting upon that good faith between states without which the world has only before it the alternatives of armed suspense or open war, and they too often lay down canons of such perilous looseness, that if their doctrine is to be accepted an unscrupulous state need never be in want of a plausible excuse for repudiating an inconvenient obligation. And this unfortunately occurs at a time when the growing laxity which is apparent in the conduct of many governments and the curious tolerance with which gross violations of faith are regarded by public opinion render it more necessary than ever that jurists should use with greater than ordinary care

<sup>1</sup> Klüber, § 164; Bluntschli, § 450 and 454; Calvo, § 610.

such small influence as they have to check wrong and to point out what is right<sup>1</sup>. PART II.  
CHAP. X.

The principle which has been mentioned as being a sufficient test of the existence of obligatory force or of the voidability of a treaty at a given moment may be stated as follows. Neither party to a contract can make its binding effect dependent at his will upon conditions other than those contemplated at the moment when the contract was entered into, and on the other hand a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered. If this be true, and it will scarcely be contradicted, it is only necessary to determine under what implied conditions an international agreement is made. When these are found the reasons for which a treaty may be denounced or disregarded will also be found. Test of  
voidability.

It is obviously an implied condition of the obligatory force of every international contract that it shall be observed by both of the parties to it. In organised communities it is settled by municipal law whether a contract which has been broken shall be enforced or annulled; but internationally, as no superior coercive power exists, and as enforcement is not always convenient or practicable to the injured party, the individual state must be allowed in all cases to enforce or annul for itself as it may choose. The general rule then Implied  
conditions  
under  
which a  
treaty is  
made.  
1. That it  
shall be  
observed  
in its  
essentials  
by both  
parties  
to it.

<sup>1</sup> Fenelon, in the following passage, perhaps claims too much favour for a short prescription, and he writes with reference to the customs of his age; but essentially he is right for all time. 'Pour donner quelque consistance au morale et quelque sûreté aux nations il faut supposer, par préférence à tout le reste deux points qui sont comme les deux pôles de la terre entière; l'un que tout traité de paix juré entre deux princes est inviolable à leur égard, et doit toujours être pris simplement dans son sens le plus naturel, et interprété par l'exécution immédiate; l'autre, que toute possession paisible et non-interrompue depuis le temps que la jurisprudence demande pour les prescriptions les moins favorables, doit acquérir une propriété certaine et légitime à celui qui a cette possession, quelque vice qu'elle ait pu avoir dans son origine. Sans ces deux règles fondamentales point de repos ni de sûreté dans le genre humain.' *Directions pour la Conscience d'un Roi. Œuvres*, vi. 319 (ed. 1810).

**PART II.** is clear that a treaty which has been broken by one of the  
**CHAP. X.** parties to it is not binding upon the other, through the  
 fact itself of the breach, and without reference to any kind  
 of tribunal. The question however remains whether a treaty  
 is rendered voidable by the occurrence of any breach, or  
 whether its voidability depends upon the breach being of  
 a certain kind or magnitude. Frequently the instrument  
 embodying an international compact includes provisions of  
 very different degrees of importance, and directed to different  
 ends. Is it to be supposed that an infraction of any one  
 of these provisions, whether it be important or unimportant,  
 whether it has reference to a main object of the treaty or  
 is wholly collateral, gives to a state the right of freeing  
 itself from the obligation of the entire agreement? Some  
 authorities hold that the stipulations of a treaty are in-  
 separable, and consequently that they stand and fall together<sup>1</sup>;  
 others distinguish between principal and secondary articles, re-  
 garding infractions of the principal articles only as destructive  
 of the binding force of a treaty<sup>2</sup>. Both views are open to  
 objection. It may be urged against the former that there  
 are many treaties of which slight infractions may take place  
 without any essential part being touched, that some of their  
 stipulations, which were originally important, may cease to  
 be so owing to an alteration in circumstances, and that to  
 allow states to repudiate the entirety of a contract upon  
 the ground of such infringements is to give an advantage  
 to those which may be inclined to play fast and loose with  
 their serious engagements. On the other hand, it is true  
 that every promise made by one party in a treaty may go  
 to make up the consideration in return for which essential  
 parts of the agreement are conceded or undertaken, and  
 that it is not for one contracting party to determine what

<sup>1</sup> Grotius, lib. ii. cap. xv. § 15 ; Vattel, liv. ii. ch. xiii. § 202 ; Heffter, § 98. Calvo (§ 613) adheres to the doctrine, but qualifies it afterwards in such a manner as to make it doubtful how far he intends it to operate.

<sup>2</sup> Wolff, *Jus Gentium*, § 432 ; De Martens, *Précis*, § 59.

is or is not essential in the eyes of the other. It is impossible to escape altogether from these difficulties. It is useless to endeavour to tie the hands of dishonest states beyond power of escape. All that can be done is to try to find a test which shall enable a candid mind to judge whether the right of repudiating a treaty has arisen in a given case. Such a test may be found in the main object of a treaty. There can be no question that the breach of a stipulation which is material to the main object, or if there are several, to one of the main objects, liberates the party other than that committing the breach from the obligations of the contract; but it would be seldom that the infraction of an article which is either disconnected from the main object, or is unimportant, whether originally or by change of circumstances, with respect to it, could in fairness absolve the other party from performance of his share of the rest of the agreement, though if he had suffered any appreciable harm through the breach he would have a right to exact reparation and an end might be put to the treaty as respects the subject-matter of the broken stipulation. It would of course be otherwise if it could be shown that a particular stipulation, though not apparently connected with the main object of the treaty, formed a material part of the consideration paid by one of the parties.

In 1856 the Crimean War was ended by the Treaty of Paris. The object of the treaty was to settle the affairs of the East, so far as possible, in a permanent manner; and in order that this should be done it was considered necessary to secure Turkey against being attacked by Russia under conditions decidedly advantageous to the latter power. To this end the prevention of the naval preponderance of Russia in the Black Sea was essential, and the simplest mode of prevention was to forbid the maintenance of a fleet. This course was accordingly fixed upon. But as, without a fleet, Russia would be exposed to danger in the event of war with a third power, unless access to the Black Sea were denied

**PART II.** to its enemy, and as at the same time, in the absence of a  
**CHAP. X.** Russian navy, the presence of foreign fleets was unnecessary to  
 Turkey, the Treaty of Paris, while limiting the number of vessels to be kept within the Sea by the two powers respectively, contained also a promise on the part of Turkey to close the Bosphorus to foreign vessels of war, except in case of hostilities in which she was herself engaged; and the Black Sea was declared to be neutral. In 1870 the Russian government seized the occasion presented by the Franco-German war to escape from the obligations under which it lay, and issued a circular declaring itself to be no longer bound by that part of the Treaty of Paris which had reference to the Black Sea. The grounds upon which it was attempted to justify this proceeding were the following. It was alleged that fifteen years' experience had shown the principle of the neutralisation of the Black Sea to be no more than a theory, because while Russia was disarmed, Turkey retained the privilege of maintaining unlimited naval forces in the Archipelago and the Straits, and France and England preserved their power of concentrating their squadrons in the Mediterranean; it was asserted that 'the treaty of the 13<sup>th</sup> March, 1856, had not escaped the modifications to which most European transactions have been exposed, and in the face of which it would be difficult to maintain that the written law, founded upon the respect for treaties as the basis of public right and regulating the relations between states, retains the moral validity which it may have possessed at other times,' the modifications indicated being the changes which had been sanctioned in Moldavia and Wallachia, and which had been effected by 'a series of revolutions equally at variance with the spirit and letter' of the treaty; finally, it was pretended that 'under various pretexts, foreign men of war had been repeatedly suffered to enter the Straits, and whole squadrons, whose presence was an infraction of the character of absolute neutrality attributed to those waters, admitted to the Black Sea.' It needed some boldness to put forward the two former

excuses. The disadvantages under which Russia lay through the ability of Turkey to maintain a fleet elsewhere than in the Black Sea, and through the power of England and France to place squadrons in the Mediterranean, were neither new nor revealed by the experience of fifteen years; the second of them was of course independent of the treaty, and the first lay before the eyes of the Russian negotiators when they consented to its stipulations. As regards the Danubian Principalities, their relations with the suzerain power had been put aside by the Treaty of Paris for precise definition in a separate convention; the language of the treaty did not exclude their union; they coalesced before a convention was signed; and Russia was a party to that by which their unification was recognised. The third ground is the only one which could be used with some plausibility. 'Whole squadrons' had not been admitted into the Black Sea, but in the course of fifteen years three American vessels, one Russian, one English, one French, and three of other nations, had apparently been allowed to enter, for reasons other than certain ones expressly recognised by the treaty as sufficient. There can be no question that in strictness a breach of the treaty had been committed; but there can be equally little doubt that the admission of a few isolated ships at different times was not an act in itself calculated to endanger the objects of the treaty, viz. the settlement of Eastern affairs and the security of Turkey, or to impair the efficacy of the safeguards given to Russia by way of compensation for the loss of naval power. Lord Granville indeed in answering the Russian circular did not think it worth while to answer the pleas which it contained. He took for granted that no breach had taken place of such kind as to free Russia from her obligations, and confined himself to 'the question in whose hand lay the power of releasing one or more of the parties to the treaty from all or any of its stipulations. It has always been held,' he says, 'that the right' of releasing a party to a treaty 'belongs only to the governments who



PART II.  
CHAP. X.  
—

have been parties to the original instrument. The despatches of the Russian government appear to assume that any one of the powers who have signed the engagement may allege that occurrences have taken place which in its opinion are at variance with the provisions of the treaty, and though their view is not shared nor admitted by the co-signatory powers, may found upon that allegation, not a request to those governments for a consideration of the case, but an announcement to them that it has emancipated itself, or holds itself emancipated, from any stipulations of the treaty which it thinks fit to disapprove. Yet it is quite evident that the effect of such doctrine and of any proceeding, which, with or without avowal, is founded upon it, is to bring the entire authority and efficacy of treaties under the discretionary control of each of the powers who may have signed them; the result of which would be the entire destruction of treaties in their essence.' The protest of Lord Granville, although uttered under circumstances which made its practical importance at the moment very slight, nevertheless compelled Russia to abandon the position which it had taken up. A conference of such of the powers, signatory of the Treaty of Paris, as could attend was held, at which it was declared that 'it is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement.' The general correctness of the principle is indisputable, and in a declaration of the kind made it would have been impossible to enounce it with those qualifications which have been seen to be necessary in practice. The force of its assertion may have been impaired by the fact that Russia, as the reward of submission to law, was given what she had affected to take. But the concessions made were dictated by political considerations, with which international law has nothing to do. It is enough from the legal point of view that the declaration purported to affirm a principle as existing,

and that it was ultimately signed by all the leading powers of Europe<sup>1</sup>. PART II.  
CHAP. X.

A second implied condition of the continuance of the obligatory force of a treaty is that if originally consistent with the primary right of self-preservation, it shall remain so. A state may no doubt contract itself out of its common law rights,—it may, for example, surrender a portion of its independence or may even merge itself in another state; but a contract of this kind must be distinct and express. A treaty therefore becomes voidable so soon as it is dangerous to the life or incompatible with the independence of a state, provided that its injurious effects were not intended by the two contracting parties at the time of its conclusion. Thus if the execution of a treaty of alliance or guarantee were demanded at a time when the ally or guaranteeing state were engaged in a struggle for its own existence or under circumstances which rendered war inevitable with another state against which success would be impossible, the country upon which the demand was made would be at liberty to decline to fulfil its obligations of alliance or guarantee. If, again, a treaty is made in view of the continuance of a particular form of government in one or both of the contracting states, either of them may release itself from the agreement so soon as its provisions become inconsistent with constitutional change<sup>2</sup>.

It is also an implied condition of the continuing obligation of a treaty that the parties to it shall keep their freedom of will with respect to its subject-matter except in so far as the treaty is itself a restraint upon liberty, and the condition is one which holds good even when such freedom of will is voluntarily given up. If a state becomes subordinated to another state, or enters a confederation of which the constitution is inconsistent with liberty of action as to matters touched by the treaty, it is not bound to endeavour

2. That it shall remain consistent with the rights of self-preservation.

3. That the parties to it shall retain their freedom of will with respect to its subject-matter.

<sup>1</sup> Hertslet's Map of Europe by Treaty, 1256-7, 1892-8, 1904.

<sup>2</sup> De Martens, Précis, § 52, 56; Wheaton, Elem. pt. iii. ch. ii. § 10; Bluntschli, § 458, 460.

PART II. to carry out a previous agreement in defiance of the duties  
 CHAP. X. consequent upon its newly-formed relations. In such cases the earlier treaty does not possess priority over the later one, because it cannot be supposed that a state will subordinate its will to that of another state, or to a common will of which its own is only a factor, except under the pressure of necessity or of vital needs, so that arrangements involving such subordination, like those made under compulsion at the end of a war, are taken altogether out of the category of ordinary treaties.

Other  
 alleged  
 grounds  
 upon which  
 a treaty  
 may be  
 voided.

Beyond the grounds afforded by these three conditions there is no solid footing upon which repudiation of treaty obligations can be placed. The other reasons for which it is alleged that states may refuse to execute the contracts into which they have entered resolve themselves into so many different forms of excuse for disregarding an agreement when it becomes unduly onerous in the opinion of the party wishing to escape from its burden. M. Heffter says that a state may repudiate a treaty when it conflicts with 'the rights and welfare of its people;' M. Hautefeuille declares that 'a treaty containing the gratuitous cession or abandonment of an essential natural right, such for example as part of its independence, is not obligatory;' M. Bluntschli thinks that a state may hold treaties incompatible with its development to be null, and seems to regard the propriety of the denunciation of the treaties of 1856 by Russia as an open question<sup>1</sup>. The doctrine of M. Fiore exhibits the extravagancies which are the logical consequence of these views. According to him 'all treaties are to be looked upon as null, which are in any way opposed to the development of the free activity of a nation, or which hinder the exercise of its natural rights;' and by the light of this principle he finds that if 'the numerous treaties concluded in Europe are

<sup>1</sup> Heffter, § 98; Hautefeuille, *Des Droits et Devoirs des Nations Neutres*, i. 9; Bluntschli, § 415 and 456.

examined they are seen to be immoral, iniquitous, and valueless<sup>1</sup>. Such doctrines as these may be allowed to speak for themselves. Law is not intended to bring licence and confusion, but restraint and order; and neither restraint nor order can be imposed by the principles of which the expression has just been quoted. Incapable in their vagueness of supplying a definite rule, fundamentally immoral by the scope which they give to unregulated action, scarcely an act of international bad faith could be so shameless as not to find shelter behind them. High-sounding generalities, by which anything may be sanctioned, are the favourite weapons of unscrupulousness and ambition; they cannot be kept from distorting the popular judgment, but they may at least be prevented from affecting the standard of law.

§ 117. An extinguished treaty may be renewed by express or tacit consent. It is agreed that when the consent is tacit it must be signified in such a manner as to show the intention of the parties unmistakably<sup>2</sup>; and it may be added that in the case of the majority of treaties it would be hard to show intention tacitly beyond chance of mistake. In such a case no doubt as that put by Vattel, who supposes a treaty of subsidy to have been concluded for a term, on the expiration of which a sum equal to the annual amount of the subsidy is offered and taken, there can be no question that the parties tacitly agree to renew the treaty for twelve months, and that the power receiving the money is bound for that time to render the services for which it is the payment. But in general intention cannot be inferred with like certainty. If, for example, it is provided in a commercial treaty that certain duties shall be levied on both sides, and the parties continue after the expiration of the treaty to levy the duties fixed by it, it is manifest that there is nothing to show that the admission of goods by one party at a certain rate is intended to be dependent upon admission by the other party

PART II.  
CHAP. X.

Renewal  
of treaties.

<sup>1</sup> *Nouv. Droit Int.* 1<sup>re</sup> p<sup>te</sup>, chap. iv.

<sup>2</sup> *Vattel*, liv. ii. ch. xiii. § 199; *Heffter*, § 99; *Calvo*, § 616.

**PART II.** at a corresponding rate, still less that the condition, if in-  
**CHAP. X.** tended, has been accepted; the conduct of both sides is  
 consistent with volunteered action in their own interests independently of any agreement<sup>1</sup>. It would in fact be unsafe to assume a treaty to be tacitly renewed except in cases in which something is done or permitted which it cannot be supposed would have been done or permitted without such an equivalent as that provided in the treaty<sup>2</sup>.

<sup>1</sup> It might perhaps be otherwise if the whole of a commercial treaty containing provisions of very various kinds continued to be observed. De Martens (quoted by Phillimore, iii. § dxxix) mentions in his treatise '*über die Erneuerung der Verträge*' that more than one treaty of commerce entered into in the seventeenth century was in existence towards the end of the eighteenth century.

<sup>2</sup> Most writers devote considerable space to a classification of treaties. Vattel, for example, divides them into equal treaties, by which 'equal, equivalent, or equitably proportioned' promises are made, and unequal treaties in which the promises do not so correspond; personal treaties which expire with the sovereign who contracts them, and real treaties which bind the state permanently. De Martens arranges them under the heads of personal and real treaties, of equal and unequal alliances, and of transitory conventions, treaties properly so called, and mixed treaties. Of these last the first kind, being carried out once for all, is perpetual in its effects; the duration of the second, which stipulates for the performance of successive acts, is dependent on the continued life of the state and other contingencies; and the third partakes of both characters. Heffter divides them into (1) '*conventions constitutives, qui ont pour objet soit la constitution d'un droit réel sur les choses d'autrui, soit une obligation quelconque de donner ou de faire ou de ne faire point* (e.g. treaties of cession, establishment of servitudes, treaties of succession); (2) '*conventions réglementaires pour les rapports politiques et sociaux des peuples et de leurs gouvernements* (e.g. treaties of commerce); (3) '*traités de société* (e.g. of alliance, or for the repression of the slave trade).' Calvo distinguishes treaties with reference to their form into transitory and permanent, with reference to their nature into personal and real, with reference to their effects into equal and unequal, and simple and conditional, finally with reference to their objects into treaties of guarantee, neutrality, alliance, limits, cession, jurisdiction, commerce, extradition, &c.

It is not very evident in what way these and like classifications are of either theoretical or practical use. Vattel (liv. ii. ch. xii, § 172-97), De Martens (*Précis*, § 58-62), Heffter (§ 89), Calvo (§ 549-76), Twiss (i. ch. xii), may however be consulted with respect to them. It may be remarked that international law is not concerned with so-called personal treaties. Accidentally the state may be mixed up with them as a matter of fact when it is identified with the sovereign, but this does not affect the question of principle. Either a treaty is such that one of the two contracting parties must be

supposed to have entered into it with a state as the other party, in which case PART II.  
it is 'real' and not terminable with the death or change of the sovereign, or CHAP. X.  
else it is such that it must be supposed to have been entered into with the —  
sovereign in his individual capacity, in which case it never affects the state  
except in so far as the individual who happens to be sovereign is able to use  
the resources of the state for his private purposes.

## CHAPTER XI.

### AMICABLE SETTLEMENT OF DISPUTES ; AND MEASURES OF CONSTRAINT FALLING SHORT OF WAR.

**PART II.**     § 118. DISPUTES can be amicably settled either by direct  
**CHAP. XI.**     agreement between the parties, by agreement under the me-  
                     diation of another power, or by reference to arbitration. The  
**Modes of**     last of these modes is the only one of which anything need be  
**settling**     said, the other two being obviously outside law.  
**disputes**  
**amicably.**

**Arbitra-**     § 119. When two states refer a disputed matter to arbi-  
**tion.**     tration, the scope and conditions of the reference are settled  
                     by a treaty or some other instrument of submission. Among  
                     the conditions are sometimes the rules or principles which  
                     are to be applied in the case. When no such rules or prin-  
                     ciples are laid down the arbitrators proceed according to the  
                     rules of civil law. To form the arbitrating tribunal the liti-  
                     gating states either choose a sovereign or other head of a  
                     state as sole arbitrator, or they fix upon one or more private  
                     persons to act in that capacity, or finally they commit to  
                     foreign states the choice of either the whole or part of a  
                     body of arbitrators. When more than one person is appointed  
                     it is usual either to make the number uneven, or to nominate  
                     a referee with whom the decision lies in case of an equal  
                     division of votes. If no such precaution is taken, and an  
                     equal division of votes occurs, the arbitration falls to the  
                     ground. When the head of a state is chosen as arbitrator  
                     it is not understood that he must examine into and decide  
                     the matter personally; he may, and generally does, place the

whole affair in the hands of persons designated by him, the decision only being given in his name. Private persons on the other hand cannot delegate the functions which have been confided to them. The arbitrating person or body forms a true tribunal, authorised to render a decision obligatory upon the parties with reference to the issues placed before it. It settles its own procedure, when none has been prescribed by the preliminary treaty; and when composed of several persons it determines by a majority of voices.

An arbitral decision may be disregarded in the following cases; viz. when the tribunal has clearly exceeded the powers given to it by the instrument of submission, when it is guilty of an open denial of justice, when its award is proved to have been obtained by fraud or corruption, and when the terms of the award are equivocal. Some writers add that the decision may also be disregarded if it is absolutely contrary to the rules of justice, and M. Bluntschli considers that it is invalidated by being contrary to international law; he subsequently says that nothing can be imposed by an arbitral decision, which the parties themselves cannot stipulate in a treaty. It must be uncertain whether in making this statement he intends to exemplify his general doctrine or to utter it in another form. Whatever may be the exact scope of these latter reserves, it is evident that an arbitral decision must for practical purposes be regarded as unimpeachable except in the few cases first mentioned; and that there is therefore ample room for the commission, under the influence of sentiment, of personal or national prejudices, of erroneous theories of law, and views unconsciously biassed by national interests, of grave injustice, for which the injured state has no remedy. It must be permissible, while human beings are human, to distrust arbitration as a means of obtaining an equitable settlement of international controversies, except where the matter at stake is unimportant, and the questions involved are rather pure questions of fact, than of law or mixed fact and law.



**PART II.** A reference to arbitration falls to the ground on the death of an arbitrator, unless provision for the appointment of another has been made, and on the conclusion of a direct agreement between the parties by way of substitution for the reference<sup>1</sup>.

**CHAP. XI:**

**Retorsion.** § 120. The measures falling short of war which it is permissible to take are called retorsion and reprisal.

Retorsion is the appropriate answer to acts which it is within the strict right of a state to do, as being general acts of state organisation, but which are evidence of unfriendliness, or which place the subjects of a foreign state under special disabilities as compared with other strangers, and result in injury to them. It consists in treating the subjects of the state giving provocation in an identical or closely analogous manner with that in which the subjects of the state using retorsion are treated. Thus if the productions of a particular state are discouraged or kept out of a country by differential import duties, or if its subjects are put at a disadvantage as compared with other foreigners, the state affected may retaliate upon its neighbours by like laws and tariffs<sup>2</sup>.

**Reprisal.** Reprisals are resorted to when a specific wrong has been committed; and they consist in the seizure and confiscation of property belonging to the offending state or its subjects by way of compensation in value for the wrong; or in seizure of property or acts of violence directed against individuals with the object of compelling the state to grant redress; or, finally, in the suspension of the operation of treaties. When reprisals are not directed against property they usually, though not necessarily, are of identical nature with, or analogous to, the act by which they have been provoked. Thus for example, when Holland in 1780 repudiated the treaty obligation, under which she lay, to succour England when

<sup>1</sup> Vattel, liv. ii. ch. xviii. § 329; Heffter, § 109; Phillimore, iii. § iii; Calvo, § 667-8; Bluntschli, §§ 488-98.

<sup>2</sup> De Martens, Précis, § 254; Phillimore, iii. § vii; Bluntschli, § 505.

attacked, the British government exercised reprisals by sus- PART II.  
pending 'all the particular stipulations concerning freedom CHAP. XI.  
of navigation and commerce, &c. contained in the several  
treaties now existing between his majesty and the republic'<sup>1</sup>.

Such measures as those mentioned are *prima facie* acts of war; and that they can be done consistently with the maintenance of peace must be accounted for, as in the case of like acts done in pursuance of the right of self-preservation, by exceptional reasons. The reasons however in the two cases are very different. In the one they are supplied by urgent necessity; in the other there is not only no necessity, but as a rule the acts for which reprisals are made, except when reprisals are used as a mere introduction to war, are of comparative unimportance. It is this which justifies their employment. They are supposed to be used when an injury has been done, in the commission of which a state cannot be expected to acquiesce, for which it cannot get redress by purely amicable means, and which is scarcely of sufficient magnitude to be a motive of immediate war. A means of putting stress, by something short of war, upon a wrongdoing state is required; and reprisals are not only milder than war, since they are not complete war, but are capable of being limited to such acts only as are the best for enforcing redress under the circumstances of the particular case. It of course remains true that reprisals are acts of war in fact, though not in intention, and that, as in the parallel instances of intervention and of acts prompted by the necessities of self-preservation, the state affected determines for itself whether the relation of war is set up by them or not. If it elects to regard them as doing so, the outbreak of war is thrown back by the expression of its choice to the moment at which the reprisals were made.

The forms of reprisals most commonly employed in recent times consist in an embargo of such ships belonging to the

<sup>1</sup> Declaration of the Court of Great Britain, 17th April, 1780. *Ann. Regist.* for 1780, p. 345.

**PART II.** offending state as may be lying in the ports of the state making  
**CHAP. XI.** reprisal, or in the seizure of ships at sea, or of any property

**Embargo**  
by way of  
reprisal.

within the state, whether public or private, which is not entrusted to the public faith. Embargo is merely a sequestration. Vessels subjected to it are consequently not condemned so long as the abnormal relations exist which have caused its imposition. If peace is confirmed they are released as of course; if war breaks out they become liable to confiscation<sup>1</sup>. It is not necessary that vessels, or other property, seized otherwise than by way of embargo, should be treated in a similar manner. They may be confiscated so soon as it appears that their mere seizure will not constrain the wrong-doing state to give proper redress. In recent times however instances of confiscation do not seem to have occurred, and probably no property seized by way of reprisal would now be condemned until after the outbreak of actual war.

**Reprisals**  
made by  
England  
upon the  
Two  
Sicilies in  
1839.

A somewhat recent case of reprisals by way of combined seizure and embargo is afforded by the proceedings taken by England against the Two Sicilies in 1839. A sulphur monopoly had been granted by the latter country to a French company in violation of a treaty of commerce made with

<sup>1</sup> The doctrine of the English courts with respect to the effect of embargo was laid down by Lord Stowell in the case of the *Boedes Lust* (v Rob. 246). The seizure of Dutch property under an embargo in 1803 was, he said, 'at first equivocal; and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, and so terminated. Such would have been the retroactive effect of that course of circumstances. On the contrary, if the transaction end in hostility, the retroactive effect is exactly the other way. It impresses the direct hostile character upon the original seizure; it is declared to be no embargo; it is no longer an equivocal act, subject to two interpretations; there is a declaration of the animus by which it is done; that it was done *hostili animo*, and is to be considered as a hostile measure, *ab initio*, against persons guilty of injuries which they refuse to redeem by any amicable alteration in their measures. This is the necessary course, if no particular compact intervenes for the restoration of such property taken before a formal declaration of hostilities.' It may be questioned whether this doctrine is not unnecessarily artificial. To imagine a hostile animus at the moment of capture is surely needless when the property has undoubtedly acquired an enemy character at the time of condemnation through the fact that war has broken out.

Great Britain in 1816. The revocation of the grant was demanded and refused; upon which the English government decided to make reprisals, and the admiral commanding the Mediterranean fleet was ordered 'to cause all Neapolitan and Sicilian ships which he might meet with either in the Neapolitan or Sicilian waters to be seized and detained, until such time as notice should be received from her Majesty's minister at Naples that this just demand of her Britannic Majesty's government had been complied with.' A number of vessels were captured accordingly, and an embargo was at the same time laid on all ships at Malta bearing the flag of the Two Sicilies. These measures not being intended to amount to war, or to be introductory to it, the English minister was directed to remain at Naples; and he in fact remained there notwithstanding that a counter embargo was laid on British vessels by the Sicilian government. The affair was ultimately composed under the mediation of France; the grant of the monopoly being rescinded, the vessels seized and embargoed by England were restored to their owners.

It must not be assumed that forms of reprisal other than the above are improper because they have for a long time been rare. The justification of reprisals being that they are the means of avoiding the graver alternative of war, it must in principle be conceded that anything short of complete war is permissible for sufficient cause. Remedies must vary in stringency with the seriousness of the injuries which call for their application. If however on the one hand the acts which may be done by way of reprisals cannot be kept within any precise bounds, on the other they stray so widely from the ordinary rules of peace that the burden of showing their necessity, and still more the necessity that they shall be of a given severity, is thrown upon the state making use of them. To make reprisals either disproportioned to the provocation, or in excess of what is needed to obtain redress, is to commit a wrong; and, to judge from the amount of feeling which has been shown with respect

PART II.  
CHAP. XI.

to some cases in which it was commonly thought that the action taken was in excess of the occasion, it may be added that the wrong is one which there is less disposition to judge leniently than there is to pardon offences of a much more really serious nature<sup>1</sup>.

Pacific  
blockade.

§ 121. Since the beginning of the present century what is called pacific blockade has been used as a means of constraint short of war, and the larger number of the few writers who mention it appear not to regard it as reprehensible. The first instance occurred in 1827, when the coasts of Greece were blockaded by the English, French and Russian squadrons, while the three powers still professed to be at peace with Turkey. Other like blockades followed in rapid succession during the next few years. The Tagus was block-

<sup>1</sup> Bynk. Quest. Jur. Pub. lib. i. c. xxiv; Vattel, liv. ii. ch. xviii. § 342-54, De Martens, Précis, § 255-62; Ortolan, Dip. de la Mer, liv. ii. ch. xvi; Heffter, § 110; Twiss, ii. § 11-20; Calvo, § 675-81; Bluntschli, § 500 and 502-4.

Much of what appears in the older and even in some modern books upon the subject of reprisals has become antiquated. Special reprisals, or reprisals in which letters of marque are issued to the persons who have suffered at the hands of the foreign state, are no longer made; all reprisals that are now made may be said to be general reprisals carried out solely through the ordinary authorised agents of the state, letters of marque being no longer issued.

It is not a little startling to find M. Bluntschli enumerating amongst forms of reprisal, the sequestration of the public debts of the state, and the arrest of subjects of the state offering provocation who may happen to be within the jurisdiction of the state making reprisals. It is true that as regards sequestration M. Bluntschli at first limits the right of making such reprisals to the case of the seizure by the wrong-doing state, '*des biens possédés sur son territoire par des citoyens de l'autre état*;' but since he goes on to mention the notorious case of the sequestration of the Silesian loan by Frederic II as an example of such reprisals, and as legitimate, he cannot intend to be bound by his general statement of law. As reprisals fall short of war, acts cannot be legitimate by way of reprisal which are not permitted even in war. It is well established that the action of Frederic II was in every way a gross violation of the then accepted law, and the principle that debts due by the state are inviolable in time of war has certainly not lost authority since his time. The arrest of foreigners as hostages is equally opposed to the unquestioned modern rule. Of course these or any other acts may be done by way of retaliation for identical acts already done by the other state; but M. Bluntschli's meaning is evidently not this; moreover such reprisals would be of the nature of hostile reprisals, that is to say, of reprisals made in order to restrain the commission of acts illegitimate according to the rules of war.

aded by France in 1831, New Granada by England in 1836, PART II.  
 Mexico by France in 1838, and La Plata from 1838 to 1840 CHAP. XI.  
 by France, and from 1845 to 1848 by France and England.  
 Since the last-mentioned year no fresh instance has occurred.  
 The practice is not therefore one which has any pretension  
 to have established itself by usage; it must stand or fall  
 by reference to general principle. From this point of view  
 it is difficult to see how it can be defended. Blockade is  
 not a measure which affects blockaded states alone. When  
 access to a port is closed every one suffers, the course of  
 whose business leads him to come in or go out of it; and  
 third states only consent that their subjects shall be exposed  
 to the loss and inconvenience inseparable from interruption  
 of trade as one of the concessions which it has become  
 habitual for neutrals to make to belligerents. Blockade is  
 thus essentially an incident of war. M. Bluntschli no doubt,  
 in treating the practice as legal, assumes the blockade to be  
 so conducted as not to touch third states, and says that they  
 have the right to exact free ingress and egress for their ships.  
 But a blockade so limited would be illusory; the power of  
 forbidding communication and of at least detaining ships in case  
 of disobedience is absolutely necessary; and as a matter of fact  
 pacific blockades have been carried out in the same manner as  
 ordinary belligerent blockades. In the case, for example, of  
 the measures adopted by France against Mexico, ships be-  
 longing to third powers were brought in for condemnation,  
 and access at least was prevented during the Anglo-French  
 blockade of La Plata. The real question then is whether a  
 state in time of peace can endeavour to obtain redress from a  
 second state for actual or supposed injuries by means which  
 inflict loss and inconvenience upon other countries. Lord  
 Palmerston at any rate thought not. In writing to Lord  
 Normanby, the ambassador at Paris in 1846, with reference  
 to the blockade of La Plata, he said, 'The real truth is,  
 though we had better keep the fact to ourselves, that the  
 French and English blockade of the Plata has been from

**PART II.** first to last illegal. Peel and Aberdeen have always declared  
**CHAP. XI.** that we have not been at war with Rosas; but blockade is  
 — a belligerent right, and unless you are at war with a state  
 you have no right to prevent ships of other states from com-  
 municating with the ports of that state—nay, you cannot  
 prevent your own merchant ships from doing so. I think  
 it important therefore, in order to legalise retrospectively  
 the operations of the blockade, to close the matter by a  
 formal convention of peace between the two powers and  
 Rosas.' To this language there is nothing to add, except an  
 expression of surprise that the subject could have ever pre-  
 sented itself to any mind in another light<sup>1</sup>.

Embargo  
 in con-  
 templation  
 of war.

§ 122. It was formerly common to place ships of a foreign  
 power under embargo, not by way of reprisals, but in con-  
 templation of war, in order to make sure of having enemy's  
 property, of a kind liable to condemnation, under command  
 at the outbreak of hostilities. The practice has happily not  
 been followed as a preliminary to recent wars. On the con-  
 trary, a tendency has been shown to found a custom not only  
 of permitting ships to leave, but of giving a time of grace  
 for lading and reaching their port of destination. As is  
 remarked by Sir Travers Twiss, 'An embargo which is made  
 merely in contemplation of war under circumstances in which  
 reprisals could not justly be granted,' or, it may be added,  
 whether they could or could not be justly granted, so long  
 as the embargo does not in fact purport to operate by way  
 of reprisals, 'cannot well be distinguished from a breach of  
 good faith to the parties who are the subject of it<sup>2</sup>.'

<sup>1</sup> Heffter (§ 111), Calvo (§ 683), Bluntschli (§ 506-7) subject to the quali-  
 fication above mentioned, and Cauchy (ii. 428) pronounce in favour of pacific  
 blockade. Pistoye et Duverdy (*Traité des Prises Maritimes*, ii. 376-8), and  
 Woolsey, in an excellent note (Appendix iii. note 8), deny the existence of a  
 right to enforce it. Lord Dalling's *Life of Lord Palmerston*, iii. 327.

<sup>2</sup> Twiss, ii. § 12; Calvo, § 678. M. Bluntschli (§ 509) condemns embargo in  
 contemplation of war unless its object is 'd'avoir sous la main un nombre de  
 navires suffisant pour user de représailles envers un ennemi qui abuserait du  
 droit de prises maritimes.' M. Bluntschli seems always ready to support any  
 practice, however doubtful its legality, or undoubted its illegality, which can  
 be used to injure or embarrass captors of private property at sea.

# PART III.

## CHAPTER I.

### COMMENCEMENT OF WAR.

§ 123. ON the threshold of the special laws of war lies the question whether, when a cause of war has arisen, and when the duty of endeavouring to preserve peace by all reasonable means has been satisfied, the right to commence hostilities immediately accrues, or whether it is necessary to give some preliminary notice of intention. *A priori* it might hardly be expected that any doubt could be felt in the matter. An act of hostility, unless it be done in the urgency of self-preservation or by way of reprisal, is in itself a full declaration of intention; any sort of previous declaration therefore is an empty formality unless an enemy must be given time and opportunity to put himself in a state of defence, and it is needless to say that no one asserts such quixotism to be obligatory. Nevertheless a declaration in some form is insisted upon by the majority of writers, and it has sometimes been treated as being so essential to the justice of hostilities that a neglect to issue one has supplied an excuse for a good deal of unnecessary invective against one at least of the states which at various times have dispensed with it.

PART III.  
CHAP. I.

Whether  
the issue  
of a de-  
claration or  
manifesto  
before the  
commence-  
ment of  
hostilities  
is neces-  
sary.

The opinion that the date of the commencement of war must be indicated by a formal notification appears to rest upon the idea that without such a notification the date of commencement must be uncertain. As between belligerents however, and the subject is being considered here solely as between belligerents, no uncertainty need exist. The



**PART III.** date of the commencement of a war can be perfectly defined  
**CHAP. I.** by the first act of hostility. A more real doubt used formerly  
 — to arise from the very fact that declarations were commonly  
 issued. In the eighteenth century declarations were frequently  
 published several months after letters of marque had been  
 granted, after general reprisals had been ordered, and even  
 after battles had been fought; and disputes in consequence  
 took place as to whether war had begun independently of  
 the declaration, or from the date of the declaration, or in  
 consequence of the declaration, but so as to date, when once  
 declared, retrospectively to the time of the first hostilities.  
 As the legitimacy of the appropriation of private property  
 depends upon the existence of a state of war, it is evident  
 that conflicts of this nature were extremely embarrassing and,  
 where different theories were in play, were altogether in-  
 soluble. To take the state of war on the other hand as  
 dating from the first act of hostility, only leads to the  
 inconvenience that in certain cases, as for example of inter-  
 vention, a state of war may be legally set up through the  
 commission of acts of hostility, which it may afterwards  
 appear that the nation affected does not intend to resent by  
 war; and, as in such cases the nation doing hostile acts can  
 always refrain from the capture of private property until the  
 question of peace or war is decided, the practical inconvenience  
 is small.

History of  
 practice.

It may be suspected that the writers who in recent times  
 have maintained the necessity of notification of some kind  
 have been unconsciously influenced by the merely traditional  
 force of ideas which belong to a period anterior to inter-  
 national law, and which are of little value under the conditions  
 of modern war. During the middle ages, and down to the  
 sixteenth century, direct notice of war was always given to an  
 intended enemy, in the earlier times by letters of defiance,  
 and latterly by heralds. Whether the practice had a distinct  
 origin, or whether it descended from the fetial law of the  
 Romans, is immaterial; it was at any rate of undisputed

authority, and, owing to the way in which war was then PART III.  
made, it was of great value in its time. When therefore it CHAP. I.  
began to die away in the transition from mediæval to  
modern civilisation, it is not surprising that the conception  
of right which it had so long embodied should reappear in  
another shape; and it happened that by leaning on natural  
law and on the growing authority of Roman custom it was  
able to secure vigorous allies. The practice of sending  
heralds was disused in the beginning of the seventeenth cen-  
tury, but Albericus Gentilis had already cited Roman usage in  
support of the assertion that the voice of God and Nature  
ordered men to renounce friendship expressly before embark-  
ing in war; and Grotius, though seeing clearly that express  
notification is useless, when it is once understood that  
demands made on one side will not be granted on the other  
without war, allowed himself in describing the 'conditional  
declaration' which he held to be commanded by natural  
law, to be tied down by ancient precedent, and especially by  
fetial forms, to a demand for reparation coupled with notice of  
war in case of non-compliance<sup>1</sup>. Zouch, in laying down  
that declaration is necessary, relies only upon fetial law;  
Pufendorf barely states that war must be duly proclaimed,  
but if the language of his predecessors be kept in mind,  
there can be little doubt as to the intention of his doctrine<sup>2</sup>.  
Thus in the seventeenth century the theoretical assertion of  
the necessity of declaration was continuous; but the views  
and habits of men of action are better represented in a  
passage of Molloy than in the pages of Grotius or Pufendorf.  
'A general war,' he says, 'is either solemnly denounced or  
not solemnly denounced; the former is when war is solemnly

<sup>1</sup> Alb. Gent. *De Jure Belli*, lib. ii. cap. i; Grotius, *De Jure Belli et Pacis*, lib. iii. cap. iii. § 6 and 7. The latest instances of the employment of a herald were in 1635, when Louis XIII sent one to Brussels to declare war against Spain, and in 1657, when Sweden declared war against Denmark by a herald sent to Copenhagen. Twiss, ii. § 32.

<sup>2</sup> Zouch, *Juris Fecialis Explicatio*, pars i. sect. 6; Pufendorf, *Law of Nature and Nations*, bk. viii. c. vi. § 9.

**PART III.** declared or proclaimed by our king against another state.

**CHAP. I.**

Such was the Dutch war, 1671. An unsolemn war is when two nations slip into a war without any solemnity; and ordinarily happeneth among us. Again, if a foreign prince invades our coasts, or sets upon the king's navy at sea, hereupon a real, though not solemn war may, and hath formerly, arisen. Such was the Spanish invasion in 1588. So that a state of war may be between two kingdoms without any proclamation or indiction thereof, or other matter of record to prove it<sup>1</sup>. The distinction which is here drawn between solemn and unsolemn war is indicative of the tenacity of life which is shown by forms; and the history of the

<sup>1</sup> De Jure Maritimo, bk. i. c. i.

Most of the wars of the seventeenth century began without declaration, though in some cases declarations were issued during their continuance. Gustavus Adolphus began and carried on his war against the Emperor without declaration (Bynkershoek, *Quæst. Jur. Pub. lib. i. cap. 2*, and Ward, *An Enquiry into the Manner in which the different Wars in Europe have commenced*, 11); in 1652 Blake and Tromp fought in the Downs before manifestos were issued, and in 1654 the expedition of Pen and Venables sailed for the West Indies without notice to Spain (Lingard, *Hist. of England*, xi. 153 and 257); from 1645 to 1657 the Dutch and the Portuguese fought in Brazil, in Africa, and in Ceylon, and it was not till the latter year that war was formally declared (De Garden, *Hist. des Traités de Paix*, i. 61-2); for a year before the English declared war against the Dutch in 1665 the latter ravaged British commerce in the Indies and the former were engaged in conquering the Dutch establishments in Africa and America (Lingard, xii. 116, &c., or De Garden, ii. 46); the letter in which Louis XIV in 1667 announced his intention to take possession of the Spanish Netherlands '*sans que la paix soit rompue de notre part*' was rather a piece of insolence than a compliance with any supposed duty of declaring war (Martin, *Hist. de France*, xiii. 315); finally in 1688, when war broke out between France and the Empire, Kaiserslautern was taken by the French on the 20th September, and the declaration of war was dated at Versailles on the 24th of the same month (Ward, 18).

Of the foregoing wars the expedition sent by Cromwell against the Spanish West Indies was little better than filibustering, and in many cases as much damage as possible was done to commerce before purely military or naval operations began. The occurrence of such incidents as the former, and the uncertainty induced by sudden attacks upon commerce, were no doubt a chief cause of the inclination to represent the issue of a declaration as a necessity; but the evil was really in the manners of the time, and it could not have been cured by an alteration of form. A declaration which could be issued at the very moment of attack (Grotius, *lib. iii. cap. iii. § 13*) could be no safeguard against unscrupulous conduct.

eighteenth century shows how powerless in this case they really were. They inspired sufficient respect to prevent prizes taken before declaration of war from being condemned until after declaration took place, and it was perhaps worth while to endeavour to excite odium against a nation by accusing it of not observing due formalities<sup>1</sup>; but wars constantly began without declaration so long as the custom of using declarations continued, and when after the Seven Years' War a practice of publishing manifestos within the country beginning the war, and of communicating them to neutral states, was substituted for direct presentation of a declaration to the enemy, wars were begun without manifestos<sup>2</sup>. The majority of writers however continued to repeat that declaration is necessary<sup>3</sup>.

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CHAP. I.

<sup>1</sup> Austria for example made use in this way of the absence of any declaration on the occasion of the invasion of Silesia by Prussia in 1740.

<sup>2</sup> The War of Succession began in 1701; the Emperor's declaration appeared on the 15th May, 1702, and that of the King of France in the following July; in 1718 the Spaniards occupied Sardinia and attacked Sicily without declaration, the Spanish fleet was destroyed by the English at Cape Passaro in August of the same year and war was declared in December; in 1740 Frederic invaded Silesia two days before his ambassador arrived at Vienna to demand the surrender of the province, no demand having been at any time previously made, so that the Austrian court was ignorant of the existence of even a ground of quarrel; in 1744 an action was fought off Toulon between the English and French fleets in February and declarations were not issued till the end of March (Ward, 19-30); in 1747 the French entered Holland without declaring war (Moser, Versuch, ix. 67); before English and French declarations were exchanged in May and June, 1756, war had been waged for two years in America, and it had become maritime since June 1755; that Frederic II on invading Saxony in 1756 pretended to have no hostile intention did not alter the fact that his conduct was only consistent with war,—he blockaded the Saxon army in Pirna, he occupied the whole country, and he caused the taxes to be paid to himself (Lord Mahon's Hist. of England, ch. xxxiii); in 1778 the expedition of D'Estaing sailed for America in April without any declaration or manifesto on the part of France, and it was the accident of a slow voyage which prevented him from surprising the English, as he had intended, in the Delaware, where he arrived on the 7th July. A declaration was issued at Versailles on the 28th of that month (Ward, 42, and Martin, Hist. de France, xvi. 433).

<sup>3</sup> Wolff, Jus Gentium, § 710; Burlamaqui (vol. ii. pt. iv. c. iv. § 15-18) is logical and says that an enemy ought not to be attacked immediately after declaration of war, 'otherwise the declaration would only be a vain ceremony;'

## PART III.

## CHAP. I.

Opinions  
of jurists  
in the  
present  
century.

In the present century the views of jurists are more divided. To M. Hautefeuille the necessity of a declaration made direct to the state against which an attack is intended seems to be incontestible, and all hostile acts done before its issue are 'flagrant violations of "le droit primitif."' It is difficult to say whether Heffter looks upon a direct declaration as a necessity in law or only as the preferable practice. M. Calvo, in spite of some inconsistencies of language, appears to regard declaration as obligatory. Riquelme thinks that a manifesto is indispensable to the regularity of war as between the belligerents, though, as it is not addressed specifically to or served upon one by the other, it is not easy to see how it can act as a notice. M. Bluntschli considers that the intention to make war must be notified to an enemy, but holds that notification is effected by the publication of a manifesto, and also that in a defensive war no declaration is required, and that a war undertaken for defensive motives is a defensive war notwithstanding that it may be militarily offensive. It would probably be seldom that a state adopting this doctrine would feel itself obliged to publish a manifesto. Wheaton says that 'no declaration or other notice to the enemy of the existence of war is necessary in order to legalise hostilities,' but he is sufficiently influenced by the conception of a difference between solemn and unsolemn war to believe that without a manifesto 'it might be difficult to distinguish in a treaty of peace those acts which are to be accounted lawful effects of war from those which either nation may consider as naked wrongs, and for which they may, under certain circumstances, claim reparation.' Klüber and Twiss consider that the practice of giving notice of hostility to an enemy ceased with the disuse of declarations in the middle of last century, and think with Phillimore that mani-

Vattel (liv. iii. ch. iv. § 51-60) also pronounces for declaration, but he allows it to be issued after the enemy's territory has been entered. Bynkershoek (Quest. Jur. Pub. lib. i. c. ii) pronounces for the legitimacy of beginning war without declaration.

festos are intended for the information of neutrals and of the subjects of the state issuing them, and that no obligation to declare war now exists as between the enemy states<sup>1</sup>. Practice on the other hand has been less variable than formerly. The United States began war with England in 1812, and with Mexico in 1846, without either notice or manifesto; and the war between France and Mexico in 1838, beginning in a blockade instituted by the former country which the latter chose to consider an act of hostility, forms an exact parallel in its mode of commencement to many of the wars of last century. The war of 1870, which was commenced by a declaration handed to Count Bismarck by the French chargé d'affaires, and that in 1877 between Russia and Turkey, which was declared by a formal despatch handed to the Turkish chargé d'affaires at St. Petersburg, afford the only instances of direct notice. In most other cases, it is believed, hostilities have been preceded by manifestos.

Looking at the foregoing facts as a whole it is evident that it is not necessary to adopt the artificial doctrine that notice must be given to an enemy before entering upon war. The doctrine was never so consistently acted upon as to render obedience to it at any time obligatory. Since the middle of last century it has had no sensible influence upon practice. In its bare form it meets now with little support, compared with that which it formerly received. In the form of an assertion that a manifesto must be published it is so enfeebled as to be meaningless. To regard a manifesto as the equivalent of a declaration is to be satisfied with a fiction, unless it be understood that hostilities are not to commence until after there is a reasonable certainty that authenticated information of its contents has reached the enemy government. The use of a declaration does not exclude surprise, but it at least provides that notice shall be served an infinitesimal space of

<sup>1</sup> Hautefeuille, *Droits et Devoirs des Nations Neutres*, tit. iii. ch. i. sect. 2; Heffter, § 120; Calvo, § 714; but see also § 711; Riquelme, i. 131-3; Bluntschli, § 521-2; Wheaton, pt. iv. ch. i. § 6; Klüber, § 238-9; Twiss, ii. § 35-7; Phillimore, iii. ch. v.

**PART III.** time before a blow is struck. A manifesto, apart from the reservation mentioned, is quite consistent with a blow before notice. The truth is that no forms give security against disloyal conduct, and that when no disloyalty occurs states always sufficiently well know when they stand on the brink of war. Partly for the convenience of the subjects of the state, and partly as a matter of duty towards neutrals, a manifesto or an equivalent notice ought always to be issued, when possible, before the commencement of hostilities; but to imagine a duty of giving notice to an enemy is both to think incorrectly and to keep open a door for recrimination in cases, which may sometimes arise, when action, for example on conditional orders to a general or admiral, takes place under such circumstances that a manifesto cannot be previously published.

**CHAP. I.**

If the above views are correct the moment at which war begins is fixed, as between belligerents, by direct notice given by one to the other, when such notice is given before any acts of hostility are done, and when notice is not given, by the commission of the first act of hostility on the part of the belligerent who takes the initiative.

Negative effects of the commencement of war.

§ 124. The outbreak of war, besides calling into existence the rights which will be discussed in the following chapters, has the negative effect of—

1. Abrogating and suspending treaties of certain kinds.
2. Putting an end to all non-hostile relations between subjects of the belligerent states.

Abrogation and suspension of treaties. Opinions of writers.

§ 125. It is not altogether settled what treaties are annulled or suspended by war, and what treaties remain in force during its continuance or revive at its conclusion. According to some writers all treaties are annulled, except in so far as they are concluded with the express object of regulating the conduct of the parties while hostilities last<sup>1</sup>. Wheaton considers that so-called 'transitory conventions,' which set up a permanent state of things by an act done once for all, such as treaties of cession or boundary, or those which create a servitude in

<sup>1</sup> Vattel, liv. iii. ch. x. § 175; Riquelme, i. 171.



favour of one nation within the territory of another, generally subsist notwithstanding the existence of war, 'and although their operation may in some cases,' which he does not specify, 'be suspended during war, they revive on the return of peace without any express stipulation;' other treaties, as of commerce and navigation, expire of course, except 'such stipulations as are made expressly with a view to a rupture<sup>1</sup>,' De Martens is of the same opinion, except that he thinks that transitory conventions may always be suspended and sometimes annulled<sup>2</sup>. Other writers, and the English and American courts, hold that 'transitory conventions' are in no case destroyed or suspended by war, they being, according to Sir Travers Twiss, less of the nature of an agreement than of a recognition of a right already existing, or, as the same view was put in the form of an example by an American judge, if treaties which 'contemplate a permanent arrangement of territorial or other national rights were extinguished by the event of war, even the treaty of 1783, so far as it fixed our limits and acknowledged our independence, would be gone,' and on the occurrence of war between England and the United States 'we should have had again to struggle for both upon original revolutionary principles<sup>3</sup>.' Others again think that all treaties remain binding unless their terms imply the existence of peace, or unless the reason for their stipulations is destroyed by the war; or else that treaties of the last-mentioned kind, such as treaties of alliance, are annulled, but that treaties of commerce, postal conventions, and other arrangements of like character, are suspended only, and that treaties or provisions in them, such as those ceding

PART III.  
CHAP. I.  
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<sup>1</sup> Elem. pt. iii. ch. ii. § 9, 10.

<sup>2</sup> Précis, § 58.

<sup>3</sup> Twiss, i. § 225-6; Sutton v. Sutton, i Russell and Mylne, 663; The Society for the Propagation of the Gospel in Foreign Parts v. The Town of Newhaven, viii Wheaton, 494. Sir R. Phillimore (pt. xii. ch. ii) seems to consider that treaties which 'recognise a principle and object of permanent policy' remain in operation, and that those which relate 'to objects of passing and temporary expediency' are annulled; but he does not very clearly indicate the boundaries of the two classes.



**PART III.** or defining territory, which are intended to be permanent,  
**CHAP. I.** remain in force ; or finally that treaties are put an end to or  
 ——— suspended only when or in so far as their execution is  
 incompatible with the war itself<sup>1</sup>.

Recent  
practice.

A like divergence of opinion is suggested by the conduct of states at the conclusion of recent wars. By the Treaty of Paris, which ended the Crimean war, it was stipulated that until the treaties or conventions existing before the war between the belligerent powers were renewed or replaced by fresh agreements, trade should be carried on on the footing of the regulations in force before the war, and the subjects of the interbelligerent states should be treated as between those states as favourably as those of the most favoured nation. Under this provision, not only were fresh treaties of commerce concluded, but it seemed necessary to Russia and Sardinia to exchange declarations to the effect that a convention for the abolition of the *droit d'aubaine*, than which no agreement could seem to be more thoroughly made in view of a permanent arrangement of rights, was to be considered as having recovered its force from the date of the exchange of ratifications of the treaty. Again, as between Austria and Sardinia in 1859, all treaties in vigour upon the commencement of the war of that year were confirmed, that is to say were stated by way of precaution to be in force, by the Treaty of Zurich, and among those treaties seem to have been a treaty of commerce and a postal convention ; but as between Austria and France no revival or confirmation of treaties was stipulated, although agreements of every kind existed between them. In 1866 the Treaty of Vienna between Austria and Italy confirmed afresh the engagements with which the Treaty of Zurich had dealt, and the Treaty of Prague revived, or in other words restipulated, all the treaties existing between Prussia and Austria in so far as they had not lost their applicability through the dissolution of the German Confederation. In 1871 the Treaty of Frankfort revived treaties of commerce

<sup>1</sup> Heffter, § 122 and 180-1 ; Calvo, § 729 ; Bluntschli, § 538.

and navigation, a railway convention having reference to the PART III. customs, copyright conventions and extradition treaties, with- CHAP. I. out making any mention of other treaties by which France and Germany were bound to each other.

Looking at the matter apart from authority and from practice, treaties and other conventions, except those made in express contemplation of war, or articles so made forming part of more general treaties, as to the binding force of which during hostilities there is no question, would seem to fall naturally for present purposes under the following heads:—

1. Treaties, such as great European territorial settlements and dynastic arrangements, intended to set up a permanent state of things by an act done once for all, in which the belligerent parties have contracted with third powers as well as with each other.

2. Treaties also binding the belligerent states with third powers as well as to each other, but unlike the former class stipulating for continuous acts or for acts to be done under certain contingencies, such for example as treaties of guarantee.

3. Treaties with political objects, intended to set up a permanent state of things by an act done once for all, which have been concluded between the belligerent parties alone, such as treaties of cession or of confederation.

4. Treaties concluded between the belligerent states only, and dealing with matters connected with the social relations of states, which from the nature of their contents appear to be intended to set up a permanent state of things, such as conventions to abolish the droit d'aubaine.

5. Treaties concluded between the belligerent states only, whether with political objects or not, which from the nature of their contents do not appear to be intended to set up a permanent state of things, such as treaties of alliance, commercial treaties, postal conventions, &c.

With regard to the first of these classes of treaties it is obvious that the fact of war makes no difference in their binding force, since each party remains bound to another

Classifica-  
tion of  
treaties  
with re-  
ference to  
war.

Conclu-  
sions.

**PART III.** with whom he is not at war. There is also no difficulty in  
**CHAP. I.**  
observing them, since they merely oblige to an abstention from acts at variance with their provisions. The second class remain equally obligatory, subject to the condition that there shall be a reasonable possibility of carrying out their provisions; but as those provisions require performance of acts, and not simply abstention from them, compliance may readily be inconsistent with the state of war or with the incidents of the particular war. Treaties of this kind therefore must be viewed according to circumstances, as continuing or as being suspended. Compacts of the third kind, on the other hand, must in all cases be regarded as continuing to impose obligations until they are either supplanted by a fresh agreement or are invalidated by a sufficiently long adverse prescription. Suppose, for example, that a province belonging to one of two states is held under a treaty of cession from the other. On the outbreak of war between them, if the treaty were annulled by the occurrence of hostilities, the former owner would re-enter the province as his own, or if it were suspended he would be able to exercise the rights of a sovereign there as against those of an occupant in the remainder of his enemy's territory. Neither of these things however takes place. The rights of a belligerent in territory which he has formerly ceded are identical with those which he has in territory which has never belonged to him. In both he has merely the rights of a military occupant; he may appropriate both; but neither become definitively his until the conclusion of a peace assigning the territory to him, or if his enemy refuses to treat until a due term of prescription has elapsed. As regards treaties of the fourth class, it would seem reasonable that they should continue or be suspended at the will of either of the belligerents. They are intended to be permanent arrangements so long as peace shall exist, and there is nothing in the fact of war to prevent them from recommencing their operation automatically with the conclusion of peace; there is therefore no reason for supposing them to be annulled. But

as all social relations are suspended for the time of war except by express or tacit permission of the sovereign, it is impossible to look upon treaty modifications of the normal social relations which are thus interrupted as being compulsorily operative during the progress of hostilities. Treaties of the fifth class are necessarily at least suspended by war, many of them are necessarily annulled, and there is nothing in any of them to make them revive as a matter of course on the advent of peace,—frequently in fact a change in the relations of the parties to them effected by the treaty of peace is inconsistent with a renewal of the identical stipulations. It would appear therefore to be simplest to take them to be all annulled, and to adopt the easy course, when it is wished to put them in force again without alteration, of expressly stipulating for their renewal by an article in the treaty of peace.

In all cases in which war is caused by differences as to the meaning of a treaty, the treaty must be taken to be annulled. During hostilities the right interpretation is at issue; and it would be pedantry to press the analogy between war and legal process so far as to regard the meaning ultimately sanctioned by victory as representing the continuing obligation of the original compact. Whether the point in dispute be settled at the peace by express stipulations, or whether the events of the war have been such as to render express stipulations unnecessary, a fresh starting-point is taken; a peace which, whether tacitly or in terms, gives effect to either of two interpretations has substituted certainty for doubt, and thus has brought a new state of things into existence.

§ 126. To say that war puts an end to all non-hostile relations between the subjects of enemy states, and between the subjects of one and the government of the other, is only to mention one of the modes of operation of the principle, which lies at the root of the laws of war, that the subjects of enemy states are enemies. The rule is thus one which must hold in strict law in so far as no exception has been established by usage. Logically it implies the cessation of existing intercourse, and

PART III.  
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Termination of non-hostile relations between subjects of the enemy states, and between the government of the one and the

**PART III.** therefore a right on the part of a state to expel or otherwise  
**CHAP. I.** treat as enemies the subjects of an enemy state found within  
 subjects of its territory; the suspension or extinction of existing contracts  
 the other. according to their nature, among extinguished contracts being  
 partnerships, since it is impossible for partners to take up  
 their joint business on the conclusion of war at precisely  
 the point where it was abandoned at its commencement;  
 a disability on the part of the subjects of a belligerent to sue  
 or be sued in the courts of the other; and finally, a prohibition  
 of fresh trading or other intercourse and of every species of  
 private contract<sup>1</sup>. Of late years it is seldom that a state  
 has exposed itself, together with its enemy, to the incon-  
 veniences flowing from a rigid maintenance of the rule of  
 law; but the mitigations of it which have taken place have  
 generally been either too distinctly dictated by the self-  
 interests of the moment alone, or have been too little sup-  
 ported by usage, to constitute established exceptions. Probably  
 the only application of the rule, a relaxation of which has  
 acquired international authority, is that which has to do  
 with the treatment of enemy subjects who happen to be in a  
 belligerent country at the outbreak of war.

Bynkershoek in speaking of the right of a belligerent state  
 to treat as prisoners enemy subjects found within its bound-

<sup>1</sup> Bynk. Quæst. Jur. Pub. lib. i. c. iii; The Hoop, i Rob. 196; The Rapid, viii Cranch, 160-2; Mr. Justice Story in *Brown v. the United States*, ib. 136; Wheaton, Elem. pt. iv. ch. i. § 13, 15; Twiss, ii. § 46-57; Phillimore, pt. ix. ch. vi. De Martens (Précis, § 269) thinks that the outbreak of war does not produce the above effects of itself, but that a state may if it chooses issue 'letters inhibitory' of all intercourse with the enemy. Heffter (§ 123) is of the same opinion. Bluntschli (§ 674) says only that 'tous rapports entre les contrées occupées par les armées ennemies sont dans la règle interdits;' thus suggesting that only personal intercourse within the area of military operations is forbidden; he at least argues, on the strength of his doctrine that the subjects of enemy states are not enemies, that this ought to be the case. Calvo (§ 728) admits the rule of law to be that all relations between the subjects of states at war with one another become interdicted by the fact of war, but regards the rule as out of date and of unjustifiable rigour.

For the revival of the right at the end of a war to enforce contracts made before its outbreak, and therefore suspended during its continuance, see *ex parte Bousmaker*, xiii Vesey, 71, and Wheaton, Elem. pt. iv. ch. i. § 12.

aries at the beginning of war, mentions that the right had PART III.  
seldom been exercised in recent times, and gives a list of CHAP. I.  
treaties, which might easily be enlarged, stipulating for the  
reservation of a specified time during which the subjects of  
the contracting parties should be allowed to withdraw them-  
selves and their property from the respective countries in the  
event of war between them<sup>1</sup>. By the early part of last  
century therefore a usage was in course of growth, under  
which enemy subjects were secured the opportunity of leaving  
in safety, and though the custom did not establish itself so

Exceptional  
usage with  
respect to  
enemy sub-  
jects in  
a belli-  
gerent  
state at  
the out-  
break of  
war.

<sup>1</sup> Bynk. Quæst. Jur. Pub. lib. i. c. iii. Vattel (liv. iii. ch. iv. § 63) says that  
'le souverain qui déclare la guerre, ne peut retenir les sujets de l'ennemi qui se  
trouvent dans ses états au moment de la déclaration. Ils sont venus chez lui  
sur la foi publique: en leur permettant d'entrer dans ses terres et d'y séjourner,  
il leur a promis tacitement toute liberté et toute sûreté pour le retour. Il doit  
donc leur marquer un temps convenable pour se retirer avec leurs effets; et  
s'ils restent au delà du terme prescrit, il est en droit de les traiter en ennemis,  
toutefois en ennemis désarmés.' Moser, on the other hand, could still write  
in 1779 that 'wann keine Verträge deswegen vorhanden seynd, ist es dem  
Europäischen Völkerrecht nicht entgegen, wann ein souverain die in seinem  
Lande befindliche feindliche Unterthanen arrestirt' (Versuch, ix. i. 49).

In the infancy of international law the harsher of these two doctrines, as might  
be expected, existed alone. Ayala says, 'Est quoque notatu dignum quod inter  
duos populos bello exorto, qui ex hostibus apud utrumque populum fuerint,  
capi possint, licet in pace venerint; nam et olim servi efficiebantur' (De Jure  
et Off. Bell. lib. i. cap. v. § 25). And Grotius writes, 'Ad minuendas hostium  
vires retineri eos (i.e. enemy subjects within the country of a belligerent)  
manente bello non iniquum videbatur; bello autem composito nihil obtendi  
poterat, quominus dimitterentur. Itaque consensum in hoc est; ut tales in  
pace semper libertatem obtinerent, ut confessione partium innocentes' (De Jure  
Bell. et Pacis, lib. iii. c. ix. § 4).

During the middle ages nevertheless it seems to have been a pretty general  
practice not to detain enemy subjects, and to give them when expelled  
sufficient warning to enable them to carry off or to sell their property. When  
Louis IX arrested the English merchants within his kingdom on the commence-  
ment of war in 1242 Matthew Paris stigmatises his conduct as 'laedens  
enormiter in hoc facto antiquam Galliae dignitatem;' by the Statute of Staples,  
27 Ed. III, it was provided that on war breaking out foreign merchants should  
have forty days in which to depart the realm with their goods; an Ordinance  
of Charles V shortly afterwards gave a like indulgence in France; and in 1483  
a treaty was concluded between France and the Hanse Towns under which  
merchants of the Hanse Confederation were to be at liberty to remain  
in the French dominions for one year after war broke out. Twiss, ii.  
§ 49.

**PART III.** firmly as to dispense altogether with the support of treaties,  
**CHAP. I.** those which were made in the end of last century, and  
 which have been made since then, may rather be looked upon  
 as intended to secure a reasonable length of time for withdrawal and for the settlement of private affairs than to guard against detention <sup>2</sup>. The solitary modern instance of detention, which is presented by the arrest of the English in France in 1803, is only excused by writers whose carelessness has allowed them to rest content with the French assertion that the act was a measure of reprisal. There can be no doubt that a right of detention no longer exists, except when persons have wilfully overstayed a period granted to them for withdrawal, and in the case of persons whose conduct or the magnitude of whose importance to their state afford reasons for special treatment; perhaps also in the case of persons belonging to the armed forces of their country.

Custom of  
 allowing  
 enemy sub-  
 jects to  
 remain in  
 a country  
 during  
 good be-  
 haviour.

It is a more real question whether, or to what extent, a usage of permitting enemy subjects to remain in a country during good behaviour is becoming authoritative. The origin of the practice is not remote. - It may fairly be inferred from the manner in which Vattel mentions the permission to remain which was given by the English government at the opening of the war of 1756 to French persons then in the country, that the instance was the only one with which he

<sup>1</sup> During the latter half of last century treaties giving from six months to a year for withdrawal and arrangement of affairs were concluded between England and Russia in 1766 (De Martens, Rec. i. 396); France and the United States in 1778 (id. ii. 596); the United States and Prussia in 1782 (id. iii. 445); Russia and Denmark in 1782 (ib. 482); the United States and Sweden in 1783 (ib. 576); the United States and Prussia in 1785 (id. iv. 47); Austria and Russia in 1785 (ib. 75); France and Russia in 1787 (ib. 207); Russia and the Two Sicilies in 1787 (ib. 245); Russia and Portugal in 1787 (ib. 335); England and Russia in 1797 (id. vi. 363); the United States and Prussia in 1799 (ib. 686); and in the present century between the United States and France in 1800 (id. vii. 100); Russia and Sweden in 1801 (ib. 334); the United States and Central America in 1825 (Nouv. Rec. vi. 837); the United States and Colombia in 1824 (ib. 988); the Zollverein and Uruguay in 1856 (id. xvi. ii. 291); the United States and Salvador in 1870 (Nouv. Rec. Gén. 2<sup>e</sup> Ser. i. 86); and the United States and Belgium in 1871 (ib. 63).



was acquainted<sup>1</sup>. When a custom began to form it is difficult to say, because residence was no doubt often tacitly allowed where evidence of permission is wanting; but in recent wars express permission has always been given, and the sentiment of the impropriety of expulsion has of late become so strong that when in 1870 the government of the National Defence in France so far rescinded the permission to remain which was accorded to enemy subjects at the beginning of the war as to expel them from the department of the Seine, and to require them either to leave France or to retire to the south of the Loire, it appeared to be generally thought that the measure was a harsh one<sup>2</sup>. It is scarcely probable that

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<sup>1</sup> Liv. iii. ch. iv. § 63. A like permission was given to Spanish subjects in England in 1762. Twiss, ii. 89.

<sup>2</sup> For the French permission of the 20th July, and the order of Gen. Trochu of the 28th of August, see D'Angeberg, *Recueil des Traités &c. concernant la Guerre Franco-Allemande*, Nos. 194 and 367.

The writers by whom the subject is mentioned still generally hold to the doctrine that a reasonable space of time for leaving the country is all that can be asked for. Heffter says (§ 126) that 'les sujets ennemis qui, lors de l'ouverture des hostilités se trouvent sur le territoire de l'une des puissances belligérantes ou qui y sont entrés dans le cours de la guerre, devront obtenir un délai convenable pour le quitter. Les circonstances néanmoins peuvent aussi rendre nécessaire leur séquestration provisoire, pour les empêcher de faire des communications et de porter des nouvelles ou des armes à l'ennemi.' Twiss (ii. § 47-8, 50) seems to think that where a commercial domicile has been acquired by a foreigner a sort of tacit contract may be presumed between him and the state that he will be allowed to live under its protection so long as he obeys its laws; but that in 'strict right' he may nevertheless be expelled on the outbreak of war, and that foreigners *in transitu* have no shadow of a claim to be allowed to stay. Calvo (§ 763) does not appear to regard even the right of withdrawal to be wholly assured where no treaty stipulations exist. Riquelme (i. 135) mentions the practice of allowing enemy subjects to continue to reside, but considers that international law only prescribes that they shall be allowed to leave the country.

There are a certain number of treaties in which the right of residence during good behaviour is stipulated for. In the treaty between England and the United States in 1795 it was stipulated that merchants and other enemy subjects 'shall have the privilege of remaining or continuing their trade, so long as they behave peaceably and commit no offence against the laws; and in case their conduct should render them suspected and the respective governments should think proper to order them to remove, the term of twelve months from the publication of the order shall be allowed them for that



**PART III.** the feeling which showed itself would have been entertained

**CHAP. I.**  
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unless public opinion was not only moving in advance of the notion that persons happening to be in a country at the outbreak of war between it and their own state ought to have some time for withdrawal, but was already ripe for the establishment of a distinct rule allowing such persons to remain during good behaviour. In the particular case some injustice was done to the French government. The fear that danger would arise from the presence of Germans in Paris may have been utterly unreasonable; but their expulsion was at least a measure of exceptional military precaution. The conduct of the government may have been foolish, but it was not wrong. Any right of staying in a country during good behaviour, which may be acquired by enemy subjects, must always be subordinate to considerations of military necessity; and whatever progress may have been made in the direction of acquiring the right itself, there can be no doubt that it is not yet firmly established.

When persons are allowed to remain, either for a specified time after the commencement of war, or during good behaviour, they are exonerated from the disabilities of enemies for such time as they in fact stay, and they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country.

purpose' (De Martens, Rec. v. 684). A like article appears in the Treaty of 1806 between the same powers (*id.* viii. 591), and in those between England and Portugal in 1810 (Nouv. Rec. iii. 212); England and Rio de la Plata in 1825 (*id.* vi. 678); England and Colombia in the same year (*ib.* 744); France and Brazil in 1826 (*ib.* 870); Austria and Brazil in 1827, by way of a most favoured nation clause (*id.* vii. 228); Denmark and Brazil in 1828 (*ib.* 613); the United States and Brazil in 1828 (*id.* ix. 64); Netherlands and Colombia, 1829 (*ib.* 587); United States and Peru in 1851 (*id.* xvi. i. 132); Zollverein and Mexico in 1855 (*id.* xvi. ii. 261); Zollverein and Argentine Confederation in 1857 (*ib.* 321); United States and Peru in 1870 (Nouv. Rec. Gén. 2<sup>e</sup> Ser. i. 105); Italy and Mexico in 1870 (*ib.* 430); and Germany and Costa Rica in 1876 (*id.* ii. 256).

## CHAPTER II.

### RIGHTS WITH RESPECT TO THE PERSON OF ENEMIES.

§ 127. BELLIGERENT rights with respect to the person of an enemy, in their actual form, represent the general right of violence over the person of all the inhabitants of a hostile country which an enemy formerly considered himself to possess, as modified by the mitigating principle, which has gradually succeeded in establishing a superior authority, that the measure of permissible violence is furnished by the reasonable necessities of war.

PART III.  
CHAP. II.  
Limits to  
the right  
of violence  
against the  
person of  
enemies.

These reasonable necessities are marked out in a broad way by the immediate objects at which a belligerent aims in attacking the person of his enemy. He endeavours to break down armed resistance, because upon the ability of his enemy to offer it depends the power of the latter to reject the terms to which it is sought to bring him. A belligerent consequently kills his armed enemies so far as is needed to overcome the national resistance, and makes prisoners of them and of persons by whom the action of the enemy state is directed. But the attainment of this immediate object of crushing the armed force opposed to him is not helped by the slaughter or ill-usage of persons who either are unable to take part in hostilities, or as a matter of fact abstain from engaging in them ; and although the adoption of such measures might tend, by intimidating the enemy, to persuade him to submit, their effect is looked upon with reason as being too little certain or immediate to

**PART III.** justify their employment<sup>1</sup>. Hence the body of persons who  
**CHAP. II.** are enemies in law split themselves in the main into two  
 classes ;—non-combatants, whom a belligerent is not allowed  
 to ill-use or to kill intentionally, except as a punishment for  
 certain acts, which though not done with the armed hand,  
 are essentially hostile<sup>2</sup>; and combatants, whom in permitted  
 places it is allowable to capture at all times, and under certain  
 conditions to kill.

**Non-com-  
batants.**

§ 128. Of the non-combatant class little need be said. It only requires to be pointed out that the immunity from violence to which they are entitled is limited by an important qualification, which is no doubt in part necessary to the prosecution of military and naval operations, but the extent of which is only to be accounted for by remembering that if the principle that the measure of permissible violence is furnished by the reasonable necessities of war is theoretically absolute, the determination of reasonable necessity in practice lies so much in the hands of belligerents that necessity becomes not infrequently indistinguishable from convenience.

<sup>1</sup> The principle that innocuous persons ought not to be killed was asserted in the Canon De Treuga (Decretal. Greg. lib. i. tit. xxxiv. cap. 2), and Franciscus à Victoria declares explicitly that '*nunquam licet per se et ex intentione interficere innocentem. Fundamentum justi belli est injuria; sed injuria non est ab innocente: ergo non licet bello uti contra illum.*' Hence . . . '*sequitur quod etiam in bello contra Turcos non licet interficere infantes. Imo nec foeminas inter infideles, . . . imo idem videtur judicium de innoxiiis agricolis apud Christianos, imo de alia gente togata et pacifica, quia omnes praesumuntur innocentes nisi contrarium constaret.*' (Relect. Theol. vi.) But these utterances of a doctrine of mercy were far in advance of the habits of the time; and their repetition by Grotius was contemporary with the horrors of the Thirty Years' War (lib. iii. cap. xi. § 8-12). From that period however opinion changed rapidly. The conduct of the French armies in the Palatinate and the Low Countries, and the Proclamation of Louis XIV to the Dutch, in which he announced that '*lorsque les glaces ouvriront le passage de tous côtés, sa majesté ne donnera aucun quartier aux habitants des villes*' (Dumont, Mem. Politiques pour servir à la parfaite Intelligence de la Paix de Ryswick, ii. 66), were reprobated throughout Europe; Pufendorf (bk. viii. c. vi. § 7) in echoing the doctrine of Grotius, spoke to a world which was already convinced; and Bynkershoek (Quæst. Jur. Pub. lib. i. cap. i) stands alone in the eighteenth century in giving to a belligerent unlimited rights of violence.

<sup>2</sup> For these acts see § 157, 188.

The qualification in question is that though non-combatants PART III.  
are protected from direct injury, they are exposed to all the CHAP. II.  
personal injuries indirectly resulting from military or naval  
operations directed against the armed forces of the state,  
whether the mode in which such operations are carried out  
be reasonably necessary or not. So far as death or injury  
may be caused by such acts as firing upon a ship carrying  
passengers, or an attack upon the train of an army, in the  
course of which for example chaplains or surgeons might  
be killed without deliberate purpose, there is no reason to  
complain of the effect of the qualification. But the bombard-  
ment of a town in the course of a siege, to take an example  
on the other side, when in strict necessity operations need  
only be directed against the works, and when therefore bom-  
bardment really amounts to an attempt to obtain an earlier  
surrender than would be militarily necessary, through the  
pressure of misery inflicted on the inhabitants, is an act  
which, though permissible by custom, is a glaring violation  
of the principle by which custom professes to be governed.

§ 129. The right to kill and wound armed enemies is Combat-  
subordinated to the condition that those enemies shall be ants.  
able and willing to continue their resistance. It is un-  
necessary to kill men who are incapacitated by wounds from  
doing harm, or who are ready to surrender as prisoners.  
A belligerent therefore may only kill those enemies whom  
he is permitted to attack while a combat is actually in  
progress; he may not as a general rule refuse quarter;  
and he cannot mutilate or maim those who fall into his  
power<sup>1</sup>.

<sup>1</sup> Vattel, liv. iii. ch. viii. § 140; De Martens, Précis, § 272; Amer. Instruct., Art. 60; Bluntschli, § 580; Art. 13 of the Project of Declaration on the Laws and Usages of War, adopted by the Conference of Brussels, as a basis of negotiation with a view to a general agreement upon the subject of the practices of war.

'Qui merci prie, merci doit avoir' was already a maxim in the fourteenth century, but in the beginning of the seventeenth century prisoners might in strict law be still slaughtered, though to do so was looked upon as 'mauvaise guerre.'

**PART III.** The general duty to give quarter does not protect an enemy  
**CHAP. II.** who has personally violated the laws of war, who has declared  
 Duty of giving quarter. his intention of refusing to grant quarter or of violating those laws in any grave manner, or whose government or commander has done acts which justify reprisals<sup>1</sup>. It may be doubted however whether the right of punishment which is thus placed in the hands of a belligerent has been used within the present century in any strictly international war, and though its existence may be a wholesome check to the savage instincts of human nature which now and then break through the crust of civilised habit, it is certain that it ought only to be sparingly exercised after great and continuous provocation, and that any belligerent who availed himself of his power would be judged with extreme severity.

Possible exception. An exception to the rule that quarter cannot be refused is also supposed to arise when from special circumstances it is impossible for a force to be encumbered with prisoners without danger to itself<sup>2</sup>. Instances of such impossibility have not presented themselves in modern warfare. Prisoners who cannot safely be kept can be liberated, and the evil of increasing the strength of the enemy is less than that of violating the dictates of humanity, unless there is reason to expect that the prisoners if liberated, or a force successfully attempting rescue, would massacre or ill-treat the captors. Subject to the condition that there shall be reasonable ground for such expectation it may be admitted that cases might occur in which the right could be legitimately exercised both at sea, and in campaigns resembling those of the Indian Mutiny, when small bodies of troops remained for a long time isolated in the midst of enemies<sup>3</sup>.

<sup>1</sup> De Martens, *Précis*, § 272 ; Amer. Instruct., Art. 63.

<sup>2</sup> Vattel, liv. iii. ch. viii. § 151 ; De Martens, *Précis*, § 272 ; Amer. Instruct. Art. 60 ; Bluntschli, § 580.

<sup>3</sup> Formerly quarter was not given to the garrison of a place which resisted an attack from an overwhelming force, which held out against artillery in the absence of sufficient fortifications, or which compelled the besiegers to deliver an assault. In 1543, for example, the French took 'Saint Bony' in Piedmont

§ 130. In the case of enemies rendered harmless by wounds or disease, the growth of humane feeling has long passed beyond the simple requirement that they shall not be killed or ill-used, and has cast upon belligerents the duty of tending them so far as is consistent with the primary duty to their own wounded. But the care which the wounded of a defeated army thus obtain is necessarily inadequate to their wants, and the usefulness of surgeons on both sides is hampered by their liability to be detained as prisoners. A step, of which the value in mitigating the unnecessary horrors of war cannot be over-estimated, would therefore be made if a general understanding were arrived at as to the treatment of persons and things engaged in the service of sick

PART III.  
CHAP. II.

Treatment  
of sick and  
wounded.

by storm, 'et furent tous ceux de dedans tuez, hors mis le capitaine, qui fu pendu, pour avoir esté si oultrageux de vouloir tenir une si meschante place devant le canon' (Mem. de Martin du Bellay, liv. ix). It might have been hoped that such a usage would now only rank among the curiosities of history. But Vattel (liv. iii. chap. viii. § 143) thinks it necessary to argue at length against executing a commandant; M. Heffter (§ 128) expresses the hope that such an execution will never occur again; M. Calvo (§ 856) treats as a still existing opinion the view that the garrison of a weak place may be massacred for resistance; Gen. Halleck (ii. 90), while condemning the practice as contrary to humanity, seems to state it as a living usage; and the Duke of Wellington, though he never acted in conformity with it, wrote in 1820 that 'I believe it has always been understood that the defenders of a fortress stormed have no right to quarter; and the practice, which has prevailed during the last century, of surrendering a fortress when a breach was opened in the body of the place and the counterscarp was blown in, was founded upon this understanding; (Despatches, 2nd Series, i. 93); finally, the Russian government thought it worth while in the original sketch of a convention respecting the laws of war to enumerate among forbidden acts 'la menace d'extermination envers une garnison qui défend obstinément une forteresse' (chap. iii. § xii).

In spite of this accumulated evidence that up to a late period the usages of war allowed a garrison to be massacred for doing their duty to their country, there can be no hesitation in excluding the practice from the list of those which are now permitted. It is wholly opposed to the spirit of the general body of the laws of war, and it therefore can only pretend to rank as an exceptional usage. But for an exceptional usage to possess validity in opposition to general principles of law it must be able to point to a continued practical recognition, which the usage in question is unable to show.

There is probably no modern instance of the indiscriminate slaughter of a garrison, except that of the massacre of the garrison and people of Ismail by the Russians in 1790, and if one instance were now to occur, the present temper of the civilised world would render a second impossible.

PART III. and wounded, which should give free scope, so far as the  
 CHAP. II. exigencies of war permit, to the action of every one whom  
 The Ge- duty or charity may enlist in their behalf. Under the  
 neva Con- Convention of Geneva of 1864, and the supplementary Con-  
 ventions. vention concluded in 1868, the European nations have bound  
 themselves to observe a code of rules framed with this object,  
 but besides that these rules have not yet acquired a definitive  
 form, they have not been formally accepted by the whole  
 body of civilised states, and are too recent to be compulsory  
 on those which have not yet signified their voluntary ad-  
 herence. From the point of view of International Law  
 therefore they only exist as a practice of great authority,  
 possessing such weight, as well from their intrinsic excellence  
 as from the number of states which have subscribed to them,  
 that all governments will probably, and perhaps may fairly  
 be expected to, regulate their conduct in accordance with  
 the principles which they embody.

Under the Geneva Conventions wounded and sick soldiers  
 must be collected and tended; while in field or military  
 hospitals, in hospital ships, or in course of being transferred  
 from one hospital to another, wounded or sick men belonging  
 to land or sea forces are regarded as neutrals; and if on  
 recovery while in the hands of the enemy it appears that  
 they are unfit for military service they must be sent back  
 to their country. By an article of the supplementary Con-  
 vention which probably demands more from a belligerent  
 than a just regard for his own interests will allow him to  
 perform, ability to serve is not to prevent the restoration  
 of convalescents on parole, except in the case of superior  
 officers. Surgeons and other persons engaged in attendance  
 on the sick and wounded or in their transport, whether  
 they are volunteers or in the service of the enemy, are  
 neutralised during such time as they are actually employed;  
 so long as there are any sick or wounded to succour, they  
 may remain in any hospital to which they may be attached,  
 and so long as they stay with it they must continue to fulfil

their duties; but they may also in the exercise of their own discretion rejoin the corps or return to the country to which they belong, the enemy having only the right to detain them for such time as may be required by strict military necessities. Field and military hospitals are also neutralised so long as any sick or wounded are in them: but while ambulances with their horses and medical and surgical stores are in no case liable to seizure, and accompany their staff when the latter rejoin the enemy, in fixed hospitals the stores are appropriated by the captors, and the medical staff in leaving only carry with them their private property. The special conditions of naval war dictate some provisions applicable to it alone. Trading vessels containing sick and wounded passengers exclusively, and not laden either with enemy's goods or with contraband of war, cannot be seized; but the fact of a visit notified in the log-book by an enemy's cruiser, by establishing ability to capture, renders the sick and wounded incapable of serving during the continuance of the war. Surgeons belonging to a captured vessel are bound to give their assistance until and during the removal of the wounded; so soon as this is effected they are free to return to their country. As hospital ships may be deprived of protection by accident of weather or position, and their capture is not therefore, as in the case of military hospitals, necessarily connected with the defeat of the force to which they belong, they are not assimilated to fixed hospitals on land, but enjoy a complete neutrality, if they have been officially designated as hospitals before the outbreak of war, and if they are unfit for warlike use; when these conditions are not satisfied they become the property of the captor, but he cannot divert them from their special employment until after the conclusion of peace. Hospital ships fitted out by societies for the aid of sick and wounded, if provided with certain guarantees, are recognised as neutral, and permitted to operate under the reserve of a right of control and visit on the part of the belligerents. In order that neutralised objects and persons

PART III.  
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PART III. shall be recognised, hospitals are indicated by a special flag,  
 CHAP. II. hospital ships by a distinctive colour, and persons attendant  
 on the sick and wounded by a badge<sup>1</sup>.

There can be no doubt that the Geneva Conventions embody the principles on which the services giving aid to sick and wounded in war will be regulated in the future, but the specific rules will probably undergo some change. In their present form they are open to criticism in many details, and the occurrences of 1870, besides suggesting that voluntary assistance may need to be brought under firmer control, betrayed at least one serious omission in the stipulations which have been accepted. The instances of disregard for the Convention, which appear to have been unfortunately numerous during the Franco-German War, may in part be explained by unavoidable accident, and in the main may probably be referred to an ignorance in the soldiery of the duties imposed upon them which it may be hoped has not been allowed to continue; but the possibility must always exist that acts will take place which cannot be so leniently judged, and until belligerents see proof that intentional violation of the Convention will be punished by their enemy, every violation will be regarded as the evidence of a laxity of conduct on his part which will lead to corresponding laxity in them<sup>2</sup>.

<sup>1</sup> See Appendix vi.

<sup>2</sup> M. Bluntschli (§ 587-9, 590-1-2) makes several criticisms on the details of the Convention and suggestions for its improvement. He notices with justice (§ 586) that the meaning of an expression in the 1st article is equivocal. It is stated that '*la neutralité cesserait si ces ambulances ou hôpitaux étaient gardés par une force militaire.*' If the word '*gardés*' is to be taken to signify '*militarily held*,' no objection can be felt to the clause; but if it is to be read in the more natural sense of '*protected*,' it sanctions a practice less liberal than that which has hitherto been customary. It is often necessary to place guards over hospitals to protect the inmates, or to prevent their contents from being plundered, and if on the appearance of the enemy these guards offer no resistance it has been usual to allow them to return to their army. The usage, and the duty of non-resistance correlative with the privilege, are illustrated by an occurrence which took place during the Peninsular War. Col. Trant on entering Coimbra, which was full of French sick and wounded, was resisted by the captain in command of the company left as a hospital guard. After sustaining an attack for three hours the captain requested to be allowed to rejoin

In 1868 a proposal was made, and rejected by the European governments, that an article should be added to the Convention rendering infractions of it penal under their Articles of War. If the language of the article had covered wilful infractions only, its rejection would not have been to their credit<sup>1</sup>.

§ 131. All persons whom a belligerent may kill become his prisoners of war on surrendering or being captured. But as the right to hold an enemy prisoner is a mild way of exercising the general rights of violence against his person, a belligerent has not come under an obligation to restrict its use within limits so narrow as those which confine the right to kill. He may capture all persons who are separated from the mass of non-combatants by their importance in the enemy's state, or by their usefulness to him in his war. Under the first of these heads fall the sovereign and the members of his family when non-combatants, the ministers and high officers of government, diplomatic agents, and any one who for special reasons may be of importance at a particular moment. Persons belonging to the auxiliary departments of an army, whether permanently or temporarily employed, such as commissariat employés, military police, guides, balloonists, messengers, and telegraphists, when not offering resistance on being attacked by mistake, or defending themselves personally during an attack made upon the combatant

PART III.  
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What persons may be made prisoners of war.

the French army, and supported his demand when it was refused by referring to the case of an English company which had just before been sent in after the battle of Busaco. Colonel Trant required an unconditional surrender. 'You are not,' he said, 'in the same position as the English company. I have taken you with arms in your hands. You have killed or wounded thirty men and a superior officer; your resistance has been long and obstinate. You may think yourselves only too happy to be prisoners at all.' Koch, *Mém. de Massena* vii. 238. General Koch insinuates that the fact of resistance ought to have made no difference in the treatment accorded to the guard; but his judgment was apt to be warped when the conduct of English is in question.

<sup>1</sup> The proposed article was as follows:—'Les hautes Puissances contractantes s'engagent à introduire dans leurs règlements militaires les modifications devenues indispensables par suite de leur adhésion à la Convention. Elles en ordonneront l'explication aux troupes de terre et de mer en temps de paix, et la mise à l'ordre du jour en temps de guerre.'

PART III. portions of the army, in which case they become prisoners  
 CHAP. II. of war as combatants, are still liable to capture, together with  
 ————— contractors and every one present with a force on business  
 connected with it, on the ground of the direct services which  
 they are engaged in rendering. Finally, sailors on board  
 enemy's trading vessels become prisoners because of their  
 fitness for immediate use on ships of war<sup>1</sup>. The position  
 of surgeons and chaplains, apart from the Convention of  
 Geneva, is not fully determined. In the eighteenth century  
 they were liable to capture, but on an exchange of prisoners

<sup>1</sup> Bluntschli, § 594-6; Manuel de Droit Int. à l'Usage des Officiers de l'Armée de Terre (French Official Handbook), 37; Am. Inst., art. 50; Project of Declaration of Brussels, § 34; Heffter, § 126. M. Bluntschli, the American Instructions, and the Project of Declaration include correspondents of newspapers among persons liable to be made prisoners of war. Probably it is only meant that they may be detained if their detention is recommended by special reasons. All persons however can be made prisoners for special reasons; newspaper correspondents in general seem hardly to render sufficiently direct service to justify their detention as a matter of course; and they are quite as often embarrassing to the army which they accompany as to its enemy. Perhaps it is unfortunate that they are enumerated as subjects of belligerent right together with persons who are always detained.

In 1870 Count Bismarck denied that sailors found in merchant vessels can be made prisoners of war, and in a note addressed to the government of the National Defence threatened to use reprisals if those who had been captured were not liberated. In justification of his doctrine he pretended that the only object of seizing merchant seamen is to diminish the number of men from whom the crews of privateers could be formed, and that therefore as France was a party to the Declaration of Paris, it must be supposed that it had 'adhered in advance' to their immunity from capture. The Comte de Chaudordy had no difficulty in showing that no such inference could be drawn from the fact of adherence to the Declaration of Paris, that the usage of capturing sailors had been invariable, that the mercantile marine of a nation, apart from any question of privateering, is capable of being transformed at will into an instrument of war, and that in countries where, as in Germany, all seafaring men are subject to conscription for the navy of the state, the reasons for capture are of double force (D'Angeberg, Nos. 580, 694, 813, 826, 911). Count Bismarck executed his threat to use reprisals, and sent Frenchmen of local importance as prisoners to Bremen in a number equal to that of the captains of merchantmen who were detained in France. If the pretension of Count Bismarck to create an international rule by his simple fiat may provoke a smile, it is rather a matter for indignation that he should attempt to prevent an adversary from acting within his undoubted rights by means which are reserved to punish and to brand violations of law.

they were commonly returned without equivalents or ransom. PART III.  
 During the Peninsular War they shared the lot of other CHAP. II.  
 non-combatants. According to De Martens a usage had in  
 his time grown up of sending them back to the enemy, and  
 Klüber recognises their entire immunity; but as both writers  
 class with them non-combatants of whose liability to capture  
 there can be no doubt, the value of their evidence is open  
 to question. More recently M. Heffter subjects surgeons  
 and chaplains to seizure; and the American Instructions for  
 armies in the field, by directing that they are only to be  
 retained if the commander of the army capturing them has  
 need of their services, render their dismissal a matter of grace<sup>1</sup>.  
 On the whole it may be concluded that as the Convention of  
 Geneva is not yet universally binding, belligerents, who are  
 unfettered as respects their enemy by its obligations, still have  
 the right to treat his medical staff as prisoners of war.

§ 132. The rights possessed by a belligerent over his Treatment  
 prisoners under the modern customs of war are defined by of pri-  
soners.  
 the same rule, that more than necessary violence must not be  
 used, which ought to govern him in all his relations with his  
 enemy. The seizure of a prisoner is the seizure of a certain  
 portion of the resources of the enemy, and whatever is needed

<sup>1</sup> Moser, ix. ii. 255 and 260. Cartel of exchange between England and France in 1798, De Martens, Rec. vi. 498. In some cases doctors, surgeons, and their assistants were returned without ransom long before any usage in their favour had begun to be formed. So far back as 1673 a provision to this effect was made in a cartel between France and the United Provinces, Dumont, vii. i. 231; and a like indulgence is stipulated for in the Anglo-French Cartel of 1780, De Martens, Rec. iii. 306. De Martens, Précis, § 276; Klüber, § 247; Heffter, § 126; American Inst., art. 53. On Massena assuming command of the army of Portugal, Lord Wellington proposed that surgeons and officers of other civil departments should, if captured, be returned. At the moment an arrangement to this effect was believed by the French to be contrary to their interests, and no notice was taken of the suggestion; but after the seizure by Colonel Trant of the whole of the French hospitals at Coimbra, the same proposal was made by Massena in his turn. It does not appear whether under the then circumstances Lord Wellington would have acceded to it, as before any answer could be given it became known that an arrangement had been made between the English and French governments for a general exchange. Wellington Despatches, vii. 591.

**PART III.** to deprive the latter of his resources during the continuance  
**CHAP. II.** of the war may be done; a prisoner therefore may be subjected to such regulations and confined with such rigour as is necessary for his safe custody. Beyond this point or for any other object no severity is permissible. The enemy has been captured while performing a legal act, and his imprisonment cannot consequently be penal.

By the practice which is founded on these principles prisoners are usually interned in a fortress, barrack, or camp, where they enjoy a qualified liberty, and imprisonment in the full sense of the word is only permissible under exceptional circumstances, as after an attempt to escape, or if there is reason to expect that an attempt to escape will be made<sup>1</sup>. If a prisoner endeavours to escape, he may be killed during his flight, but if recaptured he cannot be punished, except by confinement sufficiently severe to prevent the chance of escape, because the fact of surrender as prisoner of war is not understood to imply any promise to remain in captivity<sup>2</sup>. A belligerent may however exact obedience to rules necessary for safe custody under the sanction of punishment, and he also has the right of punishing in order to maintain discipline.

Prisoners are fed and clothed at the expense of the state which holds them in captivity, and they sometimes also receive an allowance of money<sup>3</sup>. The expenses thus incurred

<sup>1</sup> Formerly a harsher practice obtained. During the wars of Independence and of the French Revolution and Empire, prisoners of war were often kept on board ships, and sometimes in common gaols. At a remoter period they were still worse treated,—prisoners were not only sent to the galleys, but were kept there after the termination of war. In 1630 it was stipulated between England and Spain that this should not be done, and the practice does not seem to have been wholly abandoned till near the end of the seventeenth century.

<sup>2</sup> Bluntschli, § 607; Amer. Inst., art. 77. The French Official Manual (p. 77) and the Project of Declaration of Brussels (art. 28) subject a prisoner of war to disciplinary punishment for attempting to escape.

<sup>3</sup> It was formerly the custom for each state to pay the cost of the maintenance of its prisoners in the enemy's country, and when advances were made by the enemy for the subsistence of the prisoners, accounts were sometimes balanced from time to time during the war, and sometimes at its termination. Several treaties—e.g. those of Paris, 1763 (De Martens, Rec. i. 108), Versailles (De

may be recouped by their employment on work suited to their grade and social position; provided that such work has no direct relation to the war<sup>1</sup>. Prisoners are themselves allowed to work for hire on their own account, subject to such regulations as the military authorities may make. In principle the right of the captor appears to be sufficiently just, and labour is obviously better for the health of the men than is unoccupied leisure in a confined space; but it might be wished that their privilege were held to overrule the right of the enemy, so that they could only be compulsorily employed in default of work yielding profit to themselves.

§ 133. Prisoners are often released from confinement or are dismissed to their own country on pledging their parole, or word of honour, to observe conditions which render them innocuous to their enemy. They are allowed to live freely within a specified district on undertaking not to pass the assigned bounds, or they return home on giving their word not to serve against the captor for a stated time or during the continuance of the war.

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CHAP. II.

Dismissal  
of pri-  
soners on  
parole.

The release of prisoners in this manner is not necessarily an act of grace on the part of the captor; for it may often

Martens, Rec. iii. 508), between England and the United Provinces, 1783 (ib. 516), of Amiens in 1803 (id. vii. 405), of Paris in 1814 (Nouv. Rec. ii. 16), of Ghent between England and the United States in 1814 (ib. 78), and that between the United States and Prussia in 1785 (Rec. iv. 47)—contain stipulations for repayment of the amount expended on either side. See also Moser, Versuch, ix. ii. 272, and Wolff, Jus Gentium, § 816.

Under the more modern practice each state maintains the prisoners captured by it. Comp. Bluntschli (§ 605), Calvo (§ 861), and the proposed Declaration of Brussels (art. 27). In 1793 the French National Convention decreed that prisoners should be given the pay of a corresponding rank in the French service (De Martens, Rec. v. 370). During the war of 1870 France paid to officers from £4 to £13 10s. per month according to their rank, and to private soldiers 7.50 c. per day. Germany was not so liberal; privates received nothing, and officers from £1 16s. to £3 15s. per month. (D'Angeberg, No. 694.)

<sup>1</sup> Klüber, § 249; Heffter, § 129; Manuel de Droit Int. à l'Usage des Off. de l'Armée de Terre, 74; Amer. Inst., art. 76; Project of Declaration of Brussels, art. 25. Bluntschli (§ 608) would allow the employment of prisoners on any work which has not an 'immediate' relation to the war; they may be used to construct fortifications 'pendant que la lutte est encore éloignée.' He appears to stand alone.

PART III. occur that his willingness to parol them may be caused by  
CHAP. II. motives of convenience or by serious political or military reasons. Hence prisoners cannot be forced to give their parole, and their dismissal with a simple declaration by the enemy that they are paroled affects them with no obligation. So also non-commissioned officers and privates, who are not supposed to be able to judge of the manner in which their acceptance of freedom upon parole may touch the interests of their country, are not allowed to pledge themselves, except through an officer, and even officers, so long as a superior is within reach, can only give their word with his permission. Finally, the government of the state to which the prisoners belong may refuse to confirm the agreement, when made; and if this is done they are bound to return to captivity, and their government is equally bound to permit, or if necessary to enable, them to do so.

The terms upon which prisoners may be paroled are naturally defined by the character of the rights which their captor possesses over them. By keeping them in confinement he may prevent them from rendering service to their state until after the conclusion of peace. He may therefore in strictness require them to abstain not only from acts connected with the war, but also from engaging in any public employment. Generally however a belligerent contents himself with a pledge that his prisoner, unless exchanged, will not serve during the existing war against the captor or his allies engaged in the same war. This pledge is understood to refer only to active service in the field, and does not therefore debar prisoners from performing military duties of any kind at places not within the seat of actual hostilities, notwithstanding that the services thus rendered may have a direct effect in increasing the power of the country for resistance or aggression. Thus paroled prisoners may raise and drill recruits, they may fortify places not yet besieged, and they may be employed in the administrative departments of the army. As the right of a belligerent over his prisoners is limited to



the bare power of keeping them in safe custody for the duration of the war, he cannot in paroling them make stipulations which are inconsistent with their duties as subjects, or which shall continue to operate after the conclusion of peace. Thus if prisoners are liberated on condition of not serving during a specified period, before the end of which peace is concluded and hostilities again break out, they enter upon the fresh war discharged from obligation to the enemy.

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A prisoner who violates the conditions upon which he has been paroled is punishable with death if he falls into the hands of the enemy before the termination of the war<sup>1</sup>.

§ 134. Prisoners may acquire their definitive freedom during the continuance of war either by ransom or exchange.

When the European nations, under the influence of Christianity, desisted from reducing their prisoners to slavery, they preserved a remnant of the ideas which they had before held, and regarded the individual captor as acquiring a right to get such profit by way of ransom out of his prisoner as the prospect of indefinite captivity would enable him to exact. So long as armies were composed of feudal levies or of condottieri this practice remained nearly undisturbed, and it only so far changed that prisoners of great importance became the property of the sovereign, and that the sums payable, which were at first dependent on agreement in each case, gradually became settled by usage according to a tolerably definite scale<sup>2</sup>. But in proportion as royal armies

<sup>1</sup> Vattel, liv. iii. chap. viii. § 151; Moser, Versuch, ix. ii. 369; De Martens, Precis, § 275; American Instruct. § 119-33; Bluntschli, § 617-26; Project of Declaration of Brussels, arts. 31-3.

The practice of paroling troops for a specified period was common in the eighteenth century; it is now usual to require an engagement not to serve during the duration of the war.

<sup>2</sup> Edward III was amongst the first, if not the first, to take prisoners of consequence out of the hands of their captors. He was obliged however to buy them. (Lingard, Hist. of England, vol. iv. 107.) Before the end of the sixteenth century it had become an 'old custom' in England, France, and Spain, that dukes, earls, barons, or other persons *magni nominis*, should belong to the



PART III. took the place of the earlier forms of levies, the sovereign  
 CHAP. II. who paid his soldiers took to himself the right of dealing  
 with their prisoners in the manner best suited to his interests. Under the practice which thus became established in the seventeenth century, one mode of liberation continued to be by ransom, but this agreement instead of being personal became international, and a common scale under which either state should be allowed to redeem its prisoners was fixed by cartel either at the outbreaking of the war or from time to time during its continuance. Gradually this mode of recovering captive subjects became alternative with or supplementary to exchange, and of late has been so entirely superseded by it, that ransom might almost be regarded as obsolete, were it not that the possibility of its employment is contemplated by the American Instructions for Armies in the Field, and that as there is no moral objection to the practice, the convenience of particular belligerents might revive it at any moment<sup>1</sup>.

king (Ayala, *De Jure et Off. Bell.* § 27). The private interest of the actual captor however in prisoners of inferior rank died out very slowly. From a Proclamation of Charles I, of July 23, 1628, it seems that at that time it had not wholly disappeared in England; prisoners brought into the kingdom by private men were to be kept in prison at the charge of the captors, until they could be delivered by way of exchange or otherwise (Rymer, *Fœdera*, viii. ii. 270).

Gustavus Adolphus reserved to himself all prisoners of note taken by his troops, and recompensed the captor 'according to the quality of the person,' but left the prisoners of inferior rank to the takers, subject to the proviso that they should not be ransomed without the leave of a general officer. The Swedish Discipline (Lond. 1632), art. 101. Albericus Gentilis (*De Jure Belli*, lib. ii. c. 15) and Grotius (*De Jure Belli et Pacis*, lib. iii. c. xiv. § 9) mention rates of ransom customary in their day; the former stating the amount as the equivalent of the annual pay or income and pay of the prisoner, the latter as the equivalent of three months' or a month's pay, according as it would seem to the prisoner's rank. Probably Gentilis is speaking only of prisoners of superior, and Grotius of those of inferior, station.

<sup>1</sup> Vattel, liv. iii. ch. viii. § 153. and ch. xvii. § 278-81; American Instructions, § 108; Bluntschli, § 616. A Cartel of 1673 made between France and the United Provinces (Dumont, vii. i. 231) provided for ransom alternatively with exchange; and like agreements became common from that time. Examples of the rates of ransom paid in the eighteenth century for military officers and soldiers may be seen in Moser (*Versuch*, ix. ii. 390 and 408), and for naval officers and sailors in De Martens (*Rec.* iii. 304). The Cartel agreed to

Exchange consists in the simple release of prisoners by PART III. each of two belligerents in consideration of the release of <sup>CHAP. II.</sup> prisoners captured by the other, and takes place under an Exchange. agreement between the respective governments, expressed in a special form of convention called a Cartel<sup>1</sup>. As belligerents have a right to keep their prisoners till the end of the war, exchange is a purely voluntary arrangement, made by each party for his own convenience; it may therefore be refused by either, but if accepted it must evidently be based on the principle that equal values shall be given and received. Equality of value is roughly obtained by setting off the prisoners against each other, man by man according to their grade or quality, or by compensating for superiority of rank by the delivery of a certain number of inferior grade. But the principle of equality is not fully satisfied unless the prisoners handed over on one side are as efficient as those which are received from the other: if an officer is worth several privates, so also a disciplined soldier is worth more than a man destitute of training, and a healthy man more than an invalid. A government therefore in proposing or carrying out an exchange is bound not to attempt to foist up its enemy prisoners of lower value than those which it obtains from him<sup>2</sup>.

Some controversies have occurred which illustrate the bearing of this rule. In 1777 an agreement for an exchange of prisoners was made between General Washington and Sir W. Howe, in which it was merely stipulated that 'officers should be given for officers of equal rank, soldier for soldier, citizen for citizen.' When the agreement came to be carried

Controversies between

1. England and the United States in 1777;

between England and France in 1780 (id. iii. 304), which provided for the ransom of members of the naval and military forces of the two nations, is the latest instance of such agreements; and since that time no prisoners have probably been ransomed except sailors captured in merchant vessels which have subsequently been released under a ransom bill.

<sup>1</sup> For cartels and matters connected with them, see § 193.

<sup>2</sup> Vattel, liv. iii. ch. viii. § 153; Amer. Instruct., art. 105-6, 109; Bluntschli, § 612-14; Wheaton, Elem. pt. iv. ch. ii. § 3.

PART III. out, the Americans objected that 'a great proportion of those  
CHAP. XX. sent out' by the English 'were not fit subjects of exchange when released, and were made so by the severity of their treatment and confinement, and therefore a deduction should be made from the list' to the extent of the number of non-effectives. Sir W. Howe, while denying the alleged fact of severe treatment, and referring the bad state of health of the prisoners to the sickness which is said to have prevailed in the American army at the time, fully granted 'that able men are not to be required by the party, who contrary to the laws of humanity, through design, or even neglect of reasonable and practicable care, shall have caused the debility of the prisoners he shall have to offer to exchange <sup>1</sup>.'

2. England  
 and France  
 in 1810.

In 1810 negotiations for an exchange took place between England and France. At that time 43,774 French soldiers and sailors, together with 2,700 Dutch, Danes, and Russians were prisoners in England. France on her part could only offer 11,458 efficient English, but she also held in custody 500 civilian 'détenus,' and 38,355 Spaniards. The English government proposed an exchange of English as against French only; but the Emperor demanded that as the Spaniards were the allies of England they should be exchanged against French on like terms with the English, and *pari passu* with them so far that for every three Frenchmen exchanged one Englishman and two Spaniards should be handed over. The difference of quality between English or French soldiers and Spanish troops rendered the pretension that all should be exchanged on equal terms an absurd one, and the British government refused at first to admit it. Afterwards in their anxiety to procure the release of the civilians detained in France they consented to a general exchange; making it only a condition of the agreement that the exchange should begin with the release of the English against an equivalent number of Frenchmen. Their caution was justified by the

<sup>1</sup> Washington's Corresp., vol. iv. 439, 454, and Append. xiii. and xiv; Moser, Versuch, ix. ii. 291-311.

condition being rejected, and the negotiations consequently fell through<sup>1</sup>.

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CHAP. II.

It is the usage that in the absence of express stipulation exchanged prisoners must not take part in the existing war<sup>2</sup>.

Under an old custom chaplains and members of the medical staff are given up on an exchange taking place without equivalents being demanded<sup>3</sup>.

§ 135. A belligerent, besides having the rights over his enemy which flow directly from the right to attack, possesses also the right of punishing persons who have violated the laws of war, if they afterwards fall into his hands, of punishing innocent persons by way of reprisal for violations of law committed by others, and of seizing and keeping non-combatants as hostages for the purpose of enabling himself to give effect without embarrassment to his rights of war. Rights of punishment and security.

To the exercise of the first of the above-mentioned rights no objection can be felt so long as the belligerent confines himself to punishing breaches of universally acknowledged laws. Persons convicted of poisoning wells, of assassination, of marauding, of the use of a flag of truce to obtain information, or of employing weapons forbidden on the ground of the needless suffering caused by them, may be abandoned without hesitation to the fate which they deserve. When however the act done is not universally thought to be illegitimate, and the accused person may therefore be guiltless of intention to violate the laws of war, it may be doubtful whether a belligerent is justified in enforcing his own views to any degree, and unquestionably he ought as much as possible to avoid inflicting the penalty of death, or any punishment of a disgraceful kind. In 1870 the Germans issued a proclamation under which French combatants, not possessing the Punishment.

<sup>1</sup> Corresp. de Nap. i. xxi. 69; Ann. Register for 1811, p. 76.

<sup>2</sup> Bluntschli, § 613.

<sup>3</sup> For examples of early cartels in which stipulations for such surrender are contained, see Dumont, vii. i. 231; Pelet, Mem. Milit. relatifs à la Succ. D'Espagne, iii. 778; Moser, ix. ii. 397 and 418.

**PART III.** distinguishing marks considered by their enemy to be necessary,  
**CHAP. II.** \_\_\_\_\_

sary, were to be liable to the penalty of death, and in cases in which it was not inflicted were to be condemned to penal servitude for ten years, and to be kept in Germany until the expiration of the sentence<sup>1</sup>. The whole question by what kind of marks combatants should be indicated, and to what degree such marks should be conspicuous, was at the time an open one; if inadequate marks were used, they would be used in the vast majority of instances under the direction or permission of the national authorities; and the individual would as a rule be innocent of any intention to violate the laws of war. If the marks sanctioned by the French government were glaringly insufficient, there might be good reason for executing a few members of its irregular forces or for condemning some to penal servitude until the end of the war. But measures of this kind ought only to be threatened when disregard of the laws of war on the part of an enemy is clear; they ought only to be carried out in the last extremity; and it can never be legitimate to inflict a penalty extending beyond the duration of the war. To do so is to convert a deterrent into a punishment for crime; and in such cases as that in question a crime cannot be committed by the individual so long as he keeps within the range of acts permitted by his government. The case of individuals who outstep this range is of course a wholly different one.

**Reprisal.** Reprisal, or the punishment of one man for the acts of another, is a measure in itself so repugnant to justice, and when hasty or excessive is so apt to increase rather than abate the irregularities of a war, that belligerents are universally considered to be bound not to resort to reprisals except under the pressure of absolute necessity, and then not by way of revenge, but only in cases and to the extent by which an enemy may be deterred from a repetition of his offence<sup>2</sup>.

<sup>1</sup> The proclamation is given in Delerot, *Versailles pendant l'Occupation*, 104.

<sup>2</sup> *Manuel de Droit Int. à l'Usage des Off. de l'Armée de Terre*, 25; *American*

Hostages are often seized in order to ensure prompt payment of contributions and compliance with requisitions, or as a collateral security when a vessel is released on a ransom bill; more rarely they are used to guard against molestation in a retreat and for other like purposes<sup>1</sup>. Under a usage which has long become obligatory it is forbidden to take their lives, except during an attempt at escape, and they must be treated in all respects as prisoners of war, except that escape may be guarded against by closer confinement<sup>2</sup>.

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Seizure of  
hostages.

Instruct., § 27-8. See also the Articles on Reprisals submitted by the Russian Government to the Conf. of Brussels, Parl. Papers, Miscell. No. i, 1875, p. 109.

<sup>1</sup> Bluntschli, § 600; Moser, Versuch, ix. 395. and ix. ii. 458; Twiss, ii. 360; Valin, Ord. de la Marine, liv. iii. tit. ix. art. 19. The German army appears to take hostages almost as a matter of course when requisitioning and even when foraging; Von Mirus, Hülfsbuch des Kavalleristen, 2<sup>or</sup> Theil, Kap. 18. In Wolseley's Soldier's Pocket Book, p. 167, the seizure of hostages is recommended as a means of obtaining information. For hostages taken to guarantee the maintenance of order in occupied territory, see § 157.

<sup>2</sup> Vattel, liv. ii. c. xvi. § 246-7; Bluntschli, § 600; Calvo, § 869.

## CHAPTER III.

### RIGHTS WITH RESPECT TO THE PROPERTY OF THE ENEMY:

PART III. § 136. UNDER the old customs of war a belligerent pos-  
CHAP. III.  
—  
Division of the subject. sessed a right to seize and appropriate all property belonging to an enemy state or its subjects, of whatever kind it might be, and in any place where acts of war are permissible. Gradually this extreme right has been tempered by usage under the influence of the milder sentiments of recent times. In a few directions it has disappeared ; in most it has been restricted by limitations greater or less according to the nature of the property and the degree to which its seizure is possible or advantageous to the belligerent. The law upon the subject therefore is broken up into several distinct groups of rules corresponding to the differences indicated.

Those relating to the appropriation of the ultimate or eminent property possessed by the state in its territory may be put aside for the moment. As such appropriation cannot be completed until peace has been concluded or an equivalent state of things has been set up, they will find their proper place in another chapter. The remaining rules may be conveniently divided into the heads of those affecting—

1. State property other than ultimate territorial property, viz. moveables and land and buildings in which the immediate as well as the ultimate property is in the hands of the state.

2. Private property within the territory of its owner's state.

3. Private property within the jurisdiction of the enemy. PART III.

4. Private property in places not within the jurisdiction of any state. CHAP. III.

§ 137. Behind the customs with respect to the appropriation of enemy property, and modelling them with tolerable, though not with complete consistency and success, may perhaps be found the principle that property can be appropriated of which immediate use can be made for warlike operations by the belligerent seizing it, or which if it reached his enemy would strengthen the latter either directly or indirectly, but that on the other hand property not so capable of immediate or direct use or so capable of strengthening the enemy is insusceptible of appropriation. Whether this is the case or not, there is at least a rough correspondence between the principle and accepted practice, which it may be worth while to keep in mind as a sort of guide to what may or may not be seized.

§ 138. As a general rule the moveable property of the state may be appropriated. Thus a belligerent seizes all munitions of war and other warlike materials, ships of war and other government vessels, the treasure of the state and money in cheques or other instruments payable to bearer, also the plant of state railways, telegraphs, &c. He levies the taxes and customs, and after meeting the expenses of administration in territory of which he is in hostile occupation, he takes such sum as may remain for his own use<sup>1</sup>.

So far there is no question. A belligerent either seizes property already realised and in the hands of the state, or property which he may perhaps be considered to appropriate under a sort of mixed right, of which it is difficult to disentangle the elements, partly as moneys belonging to the state when they accrue due, and partly as private property,

<sup>1</sup> From the taxes, customs, or other state revenues which an enemy may take for his own use must be excepted any which have been hypothecated by the state in payment of any loan contracted with foreign lenders before the commencement of the war.



PART III. appropriated according to a scale conveniently supplied by  
 CHAP. III. the amount of existing taxation. It is, no doubt, unsatisfactory to explain thus the latter kind of appropriation ; and it probably can only be accounted for logically by adopting an inadmissible doctrine which will be discussed under the head of military occupation. The practice however is settled in favour of the belligerent.

But can he go further? Can he substitute himself for the invaded state, and appropriate moneys due upon bills or cheques requiring endorsement, or upon contract debts in any other form? Seizure in such case might not be direct ; it might have to be enforced through the courts, and possibly through the courts of a neutral state ; seizure also would not be effected once for all ; upon the question of its validity or invalidity would depend whether the invaded state could demand a second payment at a future time. The matter is therefore one of considerable importance. The majority of writers, it would seem<sup>1</sup>, consider funds in the shape contemplated to be amongst those which a belligerent can take. The arguments of M. Heffter and Sir R. Phillimore in a contrary sense appear however to be unanswerable. According to them, incorporeal things can only be occupied by actual possession of the subject to which they adhere. When territory is occupied, there are incorporeal rights, such as servitudes, which go with it because they are inherent in the land. But the seizure of instruments or documents representing debts has not an analogous effect. They are not the subject to which the incorporeal right adheres ; they are merely the evidence that the right exists, 'or, so to speak, the title-deeds of the obligee.' The right itself arises out of the purely personal relations between the creditor and the debtor ; it inheres in the creditor. It is only consequently when a belligerent is entitled to stand in the place of his enemy for all purposes, that is to say, it is only when complete conquest has been made and the identity of the conquered

<sup>1</sup> Heffter, § 134.

state has been lost in that of the victor, that the latter can stand in its place as a creditor, and gather in the debts which are owing to it<sup>1</sup>. PART III.  
CHAP. III.

Land and buildings on the other hand may not be alienated. They may perhaps be conceived of as following the fate of the territory, and as being therefore incapable of passing during the continuance of war, though as the immediate property of the state is distinguishable from the ultimate or eminent property, this view would not be satisfactory; and it is more probable that the custom, which has now become compulsory, originally grew out of the impossibility of giving a good title to a purchaser. Purchase, unlike the payment of taxes, is a voluntary act; the legitimate government therefore in recovering possession is obviously under no obligation to respect a transaction in which the buyer knows that he is not dealing with the true owner. Land and  
buildings.

An occupant may however seize the profits accruing from the real property of the state and may make what temporary use he can of the latter, subject it would seem to the proviso that he must not be guilty of waste or devastation. Thus he can use buildings to quarter his troops and for his administrative services, he receives rents, he can let lands or buildings and make other contracts with reference to them, which are good for such time as he is in occupation, and he can cut timber in the state forests; but in cutting timber, for example, apart from the local necessities of war, he must conform to the forest regulations of the country, or at least he must not fell in a destructive manner so as to diminish the future annual productiveness of the forests.

<sup>1</sup> Heffter (§ 134) discusses the question tersely; Sir R. Phillimore (pt. xii. ch. iv) with extensive learning.

The latter writer remarks that the jurists who consider that the seizure of an instrument representing a debt carries with it the right to exact payment from the debtor appear to have been misled by supposed analogies of Roman law. As in the cases contemplated by that law intention to transfer the right is supposed, and the instrument is understood to be handed over as a bequest or donation in proof of the right, the analogy is not evident.

**PART III.** From the operation of this general right to seize either the  
CHAP. III. totality, or the profits, of property according to its nature

State property attributed to the maintenance of hospitals, &c. are excluded property vested in the state but set permanently apart for the maintenance of hospitals, educational institutions, and scientific or artistic objects, and also the produce of rates and taxes of like kind levied solely for local administrative purposes<sup>1</sup>.

Archives, &c. It is also forbidden to seize judicial and other legal documents or archives and state papers, except, in the last case, for specific objects connected with the war. The retention of such documents is generally of the highest importance to the community to which they belong, but the importance is as a rule rather of a social than of a political kind; their possession by an invader, save in the rare exception stated, is immaterial to him; their seizure therefore constitutes a wanton injury.

Contents of museums, &c. Although the matter is sometimes treated as being open to doubt, there seems to be no good ground for permitting the appropriation of works of art or the contents of museums or libraries. If any correspondence ought to exist between the right of appropriation and the utility of a thing for the purposes of war, it is evident that the objects in question ought to be exempted. There is besides a very persistent practice in their favour; though it must be admitted that the major part of that practice has been prompted by reasons too narrow to support a rule of exemption as things are now viewed. During the eighteenth century works of art and the contents of collections were spared, as royal palaces were spared, on the ground of the personal courtesy supposed to be due from one prince to another. Museums and galleries are now regarded as national property. The precedents afforded by last century are consequently scarcely in point. But usage has remained unchanged. Pictures and statues and manuscripts have not been packed in the baggage of a conqueror, except during the campaigns of the Revolution

<sup>1</sup> Manuel de Droit Int. à l'Usage &c., 2<sup>e</sup> p<sup>tie</sup>, tit. iv. ch. i. § 1; Am. Inst. arts. 31 and 34; Halleck, ii. 97; Bluntschli, § 646, 648.

and of the first French Empire. The events which accompanied the conclusion of peace in 1815 were not of a kind to lend value to the precedents which those campaigns had created. The works of art which had been seized for the galleries of Paris during the early years of the century were restored to their former owners; and Lord Castlereagh in suggesting their restoration by a note addressed to the ministers of the allied powers on Sept. 11, 1815, pointed out that it was a duty to return them to the countries to which 'they of right belonged,' and stigmatised the conduct of France as 'a reproach to the nation by which it has been adopted.' A restoration effected in consequence of this note may be taken to be a solemn affirmation of the principle of exemption by all the great powers except France; and if the language of the Declaration on the laws of war proposed at the Conference of Brussels was somewhat ambiguous, the discussion reported in the Protocols shows that it was not wished to reserve a right of carrying off works of art, but to subject them to the momentary requirements of military necessity<sup>1</sup>.

<sup>1</sup> The practice or doctrine of exemption is indicated or stated by Moser (*Versuch*, ix. i. 159); De Martens (*Précis*, § 280); Klüber (§ 253); Calvo (§ 889-91). See also *Manuel de Droit Int. à l'Usage &c.* p. 119.

Sir T. Twiss (§ 68) also seems to hold that public collections are exempt from capture, and quotes a case in which a collection of Italian paintings and prints taken by a British vessel on its passage from Italy to the United States in 1812 was restored to the Academy of Arts at Philadelphia on the ground that 'the arts and sciences are considered not as the peculium of this or that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species; and that the restitution of such property to the claimants would be in conformity with the Law of Nations, as practised by all civilised countries.' For the documents relating to the restoration of the works of art in Paris in 1815 to their former owners, see De Martens, *Nouv. Rec.* ii. 632-44; in one of the despatches there given the Duke of Wellington speaks of the French appropriations as having been 'contrary to the practice of civilised war.'

Vattel and Heffter take no notice of the matter; Wheaton (pt. iv. ch. ii. § 6) refrains from giving any opinion of his own.

Halleck (ii. 104) and Bluntschli (§ 651) consider that the immunity of works of art and like objects is not obligatory on a belligerent. Sir Samuel Romilly's speech of February 20, 1816, which is sometimes quoted in favour of this view, merely objects to the restitution made by the allies that the most valuable of the works of art seized by the French had been secured to them by treaty

PART III. Finally, vessels engaged in exploration or scientific discovery are granted immunity from capture. The usage began in the last century when Bougainville and La Pérouse appear to have been furnished with safe-conducts to protect them in the event of war breaking out during their voyage, and the French government in 1776 ordered all men of war and privateers to treat Captain Cook as a neutral so long as he abstained from acts of hostility. During the present century there have been several occasions on which there has been reason for behaving in a like manner, and on which accordingly vessels have been furnished with protections. The most recent of these was the despatch of the Austrian corvette *Novara* on a scientific expedition in 1859<sup>1</sup>.

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Vessels engaged in scientific discovery.

Private property within the territory of its owner's state. Land, &c

§ 139. Of the private property found by a belligerent within the territory of his enemy, property in land and houses, including property in them held by others than their absolute owners, was very early regarded as exempt from appropriation. The exemption was no doubt determined by reasons much the same as those which have been suggested as accounting for the prohibition to alienate state domains. Land being immoveable, its fate was necessarily attendant on the ultimate issue of hostilities; an invader could not be reasonably sure of continued possession for himself, nor could he give a firm title to a purchaser; and these impossibilities re-acted upon his mind so as to prevent himself from feeling justified in asserting the land to be his.

Personal property.

Personal property on the other hand, until a late period, consisted mainly in the produce of the soil, merchandise, coin, and moveables of value. It was therefore of such kind that much of it being intended to be destroyed in the natural course of use, an invader could render his ownership effective by

stipulations, and that the allies had no right to override treaties made between France and other states by unilateral acts of their own. This contention may be well founded enough, but of course it has nothing to do with the principle in question. *Hansard*, xxxiii. 759.

<sup>1</sup> Halleck, ii. 149; Calvo, § 932.

consuming the captured objects, and that all of it was capable of being removed to a place of safety whither it might reasonably be supposed that its owner would be unable to follow it. Hence personal property remained exposed to appropriation by an enemy; and so late as the seventeenth century, armies lived wholly upon the countries which they invaded, and swept away what they could not eat by the exercise of indiscriminate pillage. But gradually the harshness of usage was softened, partly from an increase of humane feeling, partly for the selfish advantage of belligerents, who saw that the efficiency of their soldiers was diminished by the looseness of discipline inseparable from marauding habits, and who found, when war became systematic, that their own operations were embarrassed in countries of which the resources were destroyed. A custom grew of allowing the inhabitants of a district to buy immunity from plunder by the payment of a sum of money agreed upon between them and the invader<sup>1</sup>, and by furnishing him with specified quantities of articles required for the use of his army; and this custom has since hardened into a definite usage, so that the seizure of moveables or other personal property

<sup>1</sup> Both the Swedes and Imperialists commonly admitted towns to ransom during the Thirty Years' War; see the cases, e.g., of Munich, Würzburg, Freisingen, and Rothenburg, which paid contributions to the Swedes, and those of Hildesheim, Spire, Bayreuth, and Altenburg, to the Imperialists. Swedish Intell. pts. ii. and iii. From the Army Regulations of Gustavus Adolphus may be seen the intimate connection between the restriction of pillage and the sense of its bad effect on the efficiency of the soldiery. 'They that pillage or steal eyther in our land or in the enemies or from any of them that come to furnish our leaguer or strength, without leave, shall be punisht for it as for other theft. If it so please God that we beate the enemy either in the field or in his leaguer then shall every man follow the chase of the enemies; and no man give himself to fall upon the pillage, so long as it is possible to follow the enemy, and untill such time as he be assuredly beaten. Which done then may their quarters be fallen upon, every man taking what he findeth in his owne quarter.' The Swedish Discipline, London, 1632, p. 56. It would seem that as a general rule pillage was only permitted in the Swedish army after a battle or the capture of a town; the Swedish soldiers however were at that time far better organised and disciplined than those of any other country, and the habits of the Imperialists were very different.

PART III. in its bare form has, except in a very few cases, become  
 CHAP. III. illegal.

The former custom of pillage was the most brutal among the recognised usages of war. The suffering which directly attended it was out of all proportion to the advantages gained by the belligerent applying it; and it opened the way to acts which shocked every feeling of humanity. In the modern usage however, so long as it is not too harshly enforced, there is little to object to. As the contributions and requisitions which are the equivalents of compositions for pillage are generally levied through the authorities who represent the population, their incidence can be regulated; they are moreover unaccompanied by the capricious cruelty of a bombardment, or the ruin which marks a field of battle. If therefore they are compared, not merely with universal pillage, but with more than one of the necessary practices of war, they will be seen to be relatively merciful. At the same time if they are imposed through a considerable space of territory, they touch a larger proportion of the population than is individually reached by most warlike measures, and they therefore not only apply a severe local stress, but tend, more than evils felt within a narrower range, to indispose the enemy to continue hostilities.

Contribu-  
tions and  
requisi-  
tions.

§ 140. The regulated seizure of private property is effected by the levy of contributions and requisitions. Contributions are such payments in money as exceed the produce of the taxes, which, as has been already seen, are appropriated as public property. Requisitions consist in the render of articles needed by the army for consumption or temporary use, such as food for men and animals, and clothes, waggons, horses, railway material, boats, and other means of transport, and of the compulsory labour, whether gratuitous or otherwise, of workmen to make roads, to drive carts, and for other such services<sup>1</sup>. The amount both of contributions and

<sup>1</sup> It is constantly said, apparently on the authority only of De Garden, that the term 'requisition,' and the mode of appropriation signified by it, were



requisitions is fixed at the will of the invader<sup>1</sup>; the com-  
 mander of any detached body of troops being authorised  
 under the usual practice to requisition objects of immediate  
 use, such as food and transport, while superior officers are  
 alone permitted to make demands for clothing and other  
 articles for effecting the supply of which some time is  
 necessary<sup>2</sup>, and contributions can be levied only by the

PART III.  
 CHAP. III.

both invented by Washington. The term may very possibly have been invented by him, but the practice is of much older date. Indeed, considering the difficulties of transport before his time, requisitions were most likely larger during the whole of the eighteenth century in proportion to the size of the armies employed than they now are. The use of the word contribution to express both contributions and requisitions has tended to keep the fact that the latter were exacted from becoming prominent; but there are plenty of passages in despatches and military memoirs in which the context shows that the word contribution is used of contributions in kind, that is to say of determinate quantities of specified articles furnished on the demand of an enemy by a given place or district. Not infrequently the levy of requisitions is plainly stated; and their systematic use is prescribed by Frederic II. 'If an army is in winter quarters in an enemy's country,' he says, 'the soldiers receive gratis bread, meat, and beer, which are furnished by the country.' A few lines further on he adds that 'the enemy country is bound to supply horses for the artillery, munitions of war, and provisions, and to make up any deficiency in money.' *Les Principes Généraux de la Guerre*, Œuv. xxviii. 91. Comp. Moser, *Versuch*, ix. i. 378.

<sup>1</sup> Towards the end of the seventeenth century the custom of making bargains with towns or districts by way of compounding for pillage seems to have been changed into one under which belligerent sovereigns at the commencement of war made arrangements with each other limiting the amount of the contributions which should be levied in their respective territories on invasion taking place, and fixing the conditions under which they should be imposed (Vattel, liv. iii. ch. ix. § 165); but in the eighteenth century usage again altered, and while contributions were invariably substituted for pillage, except in the case of towns taken by assault, the amount was usually settled in the same manner as at present. Moser (*Versuch*, ix. i. 376) gives both methods as used.

<sup>2</sup> In 1870, for example, an order issued by the commanders-in-chief of the German armies stated that 'tous les commandants de corps détachés auront le droit d'ordonner la réquisition de fournitures nécessaires à l'entretien de leurs troupes. La réquisition d'autres fournitures jugées indispensables dans l'intérêt de l'armée ne pourra être ordonnée que par les généraux et les officiers faisant fonctions de généraux.' D'Angeberg, No. 328. In 1797 Napoleon ordered that a general of division should not make 'd'autres réquisitions que celles nécessaires pour les objets de subsistance, pour les transports indispensables, et pour les souliers;' all others were to be made by the commander-in-chief alone. *Corresp.* ii. 321. See also the Project of Declaration of Brussels, art. 41-2.



**PART III.** commander-in-chief, or by the general of a corps acting  
**CHAP. III.** independently. Hostages are sometimes seized to secure the payment or render of contributions and requisitions; and when the amount demanded is not provided by the time fixed, the invader takes such measures as may be necessary to enforce compliance at the moment or to guard by intimidation against future disobedience<sup>1</sup>. Receipts or 'bons de réquisition' are given in acknowledgment of the sums or quantities exacted in order that other commanders may not make fresh impositions without knowing the extent of those already levied, and to facilitate the recovery by the inhabitants from their own government of the amounts paid, if the latter determines on the conclusion of peace to spread the loss suffered over the nation as a whole<sup>2</sup>.

<sup>1</sup> The nature of the methods which are sometimes used may be seen from the measures taken by the Germans in Nancy in January, 1871:—

'Considerant qu'après avoir requis 500 ouvriers, en vue d'exécuter un travail urgent ceux-ci n'ont pas obtempéré à nos ordres; arrêtons:—

'1°. Aussi longtemps que ces 500 ouvriers ne se seront pas rendus à leur poste, tous les travaux publics du département de la Meurthe seront suspendus; sont donc interdits tous travaux de fabrique, de voirie, de rues ou de chemins, de construction et autres d'utilité publique.

'2°. Tout atelier privé qui occupe plus de dix ouvriers sera fermé dès à présent et aux mêmes conditions que pour les travaux prémentionnés; sont donc fermés tous ateliers de charpentiers, menuisiers, maçons, manoeuvres, tous travaux de mine et fabriques de toute espèce.

'3°. Il est en même temps défendu aux chefs, entrepreneurs et fabricants, dont les travaux ont été suspendus, de continuer à payer leurs ouvriers.

'Tout entrepreneur, chef ou fabricant qui agira contrairement aux dispositions ci dessus mentionnées, sera frappé d'une amende de 10 à 50,000 francs pour chaque jour où il aura fait travailler et pour chaque paiement opéré.

'Le présent arrêté sera révoqué aussitôt que les 500 ouvriers en question se seront rendus à leur poste, et il leur sera payé à chacun un salaire de 3 francs par jour.'

An intimation was at the same time made to the Mayor of Nancy which caused him to issue the following proclamation:—'Monsieur le Préfet de la Meurthe vient de faire à la mairie de Nancy l'injonction suivante: "Si demain mardi, 24 Janvier, à midi, 500 ouvriers des chantiers ne se trouvent pas à la gare, les surveillants d'abord, et un certain nombre d'ouvriers ensuite, seront saisis et fusillés sur lieu.'" D'Angeberg, Nos. 1016, 1017.

<sup>2</sup> On contributions and requisitions see Vattel, liv. iii. ch. ix. § 165; Moser, Versuch, ix. i. 375-83; Halleck, ii. 109-14; Bluntachli, § 653; Calvo, § 901-6; Manuel de Droit Int. à l'Usage &c., p<sup>te</sup> ii. tit. iv. ch. iii.

No usage is in course of formation tending to abolish or PART III.  
 restrain within specific limits the exercise of the right to CHAP. III.  
 levy contributions and requisitions. The English on entering France in 1813, the army of the United States during the Mexican War, and the Allied forces in the Crimea, abstained wholly or in the main from the seizure of private property in either manner; but in each case the conduct of the invader was dictated solely by motives of momentary policy, and his action is thus valueless as a precedent. There is nothing to show that the governments of any of the countries mentioned have regarded the levy of contributions and requisitions as improper; and that of the United States, while allowing its generals in Mexico to use their discretion as to the enforcement of their right, expressly affirmed it in the instructions under which they acted<sup>1</sup>. One of the articles of the proposed Declaration of Brussels, had it become law, would have deprived an invader of all right to levy contributions except in the single case of a payment in money being required in lieu of a render in kind, and would therefore have enabled him at a maximum to demand a sum not greater than the value of all articles needed for the use and consumption of the army and not actually requisitioned<sup>2</sup>. But so long as armies are of the present size it may be doubted whether the inhabitants of an occupied territory would gain much by a rule under which an invader would keep possession of so liberal a privilege; and though the representatives of some minor states put forward the view

<sup>1</sup> Mr. Marcy's Instructions to Gen. Taylor, quoted by Halleck, ii. 112. The Treaty of Guadalupe Hidalgo, which closed the Mexican war, provided that during any future hostilities requisitions shall be paid for 'at an equitable price if necessity arise to take anything for the use of the armed forces.' De Martens, *Nouv. Rec. Gén.* xiv. 34. Probably the treaty of 1785 between the United States and Prussia (*id. Rec.* iv. 47) is the only other in which a like provision is contained, and the article directing that private property if taken should be paid for was struck out when the treaty was renewed in 1798.

<sup>2</sup> The so-called contributions by way of fine, or as equivalents of the taxes payable by the population to its own government, which are mentioned in the same article, are not of course contributions in the proper sense of the word.

**PART III.** that a belligerent ought to pay or definitively promise to pay  
**CHAP. III.** for requisitioned articles, the scheme of declaration as finally settled gave to the right of requisition the entire scope which is afforded by the so-called 'necessities' of war<sup>1</sup>. It must not be forgotten that in the war of 1870-1 the right of levying contributions and requisitions was put in force with more than usual severity<sup>2</sup>.

Whether contributions and requisitions are a form of appropriation of private property.

The subject of the appropriation of private property by way of contribution and requisition cannot be left without taking notice of a doctrine which is held by a certain school of writers, and which the assailants of the right of maritime capture use in the endeavour to protect themselves against a charge of inconsistency. It is denied that contributions and requisitions are a form of appropriation of private property. As pillage is not now permitted, payments in lieu of it must, it is said, have become illegal when the right to pillage was lost; a new 'juridical motive' must be sought for the levy of contributions and requisitions; and it is found in 'a right, recognised by public law as belonging to an occupying belligerent, to exercise sovereign authority to the extent necessary for the maintenance and safety of his army in the occupied country, where the power of the enemy government is suspended by the effect of his operations.' Private

<sup>1</sup> Arts. 40-1, and see Parl. Papers, Miscell. i. 1875, 97-9, 102-9, 128.

<sup>2</sup> The language of some writers (Heffter, § 131; Bluntschli, § 653-5; Calvo, § 905-6) might at first sight be supposed to mean that under the existing rules of law articles or services can only be obtained by requisition on payment of their value. A closer examination shows this construction to be hasty. According to M. Heffter the payment is to be provided for by the terms of peace; in other words, the invader merely pays if his enemy becomes strong enough to compel him to do so. M. Bluntschli says that 'il faut dédommager les propriétaires, et d'après les principes du droit naturel, cette tâche incombe en première ligne à l'état qui saisit ces biens et les emploie à son profit. Si les réclamations dirigées contre cet état n'aboutissaient pas, l'équité exigerait que l'état sur le territoire duquel la réquisition a eu lieu fut rendu subsidiairement responsable.' But he remarks elsewhere that 'l'armée ennemie manque la plupart du temps de l'argent nécessaire; elle se bornera donc en général à constater le paiement des contributions. . . . Les réquisitions sont donc la plupart du temps pour les particuliers un mal inséparable de la guerre et qui doit être supporté par ceux qui en sont atteints.'

property is thus not appropriated, but 'subjected to inevitable charges' laid upon it in due course of ordinary public law<sup>1</sup>. PART III.  
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It is not the place here to discuss the assertion that an invader temporarily stands in the stead of the legitimate sovereign. It is enough for the moment to say that the legal character of military occupation will be shown later to be wholly opposed to the doctrine of such substitution, that in order to find usages of occupation which require that doctrine to explain them it is necessary to go back to a time of less regulated violence than the present, that taking occupation apart from any question as to contributions and requisitions practice and opinion have both moved steadily away from the point at which substitution was admitted, and that thus the theory which affects to be a progress is in truth a retrogression<sup>2</sup>. On the minor point of the alleged necessity of the charges laid by way of contribution and requisition on the population of an occupied territory, it can hardly be requisite to point out that no such necessity exists. It is often impracticable to provide subsistence and articles of primary necessity for an army without drawing by force upon the resources of an enemy's country; labour is often urgently wanted; and when wanted it must be obtained; but there is nothing to prevent a belligerent from paying on the spot or giving acknowledgments of indebtedness binding himself to future payment. If a state cannot afford to pay, it simply labours under a disadvantage inseparable from its general position in the world, and identical in nature with that which weighs upon a country of small population or weak frontier. Whether states cannot or will not pay, fictions cannot be admitted into law in order to disguise the fact that private property is seized. That its seizure is effective, and that seizure as now managed is a less violent practice than many with which

<sup>1</sup> See for example Bluntchli, *Du Droit du Butin*, *Rev. de Droit Int.* ix. 545.

<sup>2</sup> § 155.

PART III. belligerent populations unhappily become familiar, has been  
 CHAP. III. already said. It may be indulged in without shame while  
 — violence is legitimate at all; and so long as the practice lasts, it will be better to call it honestly what it is than to pretend that it is authorised by a right which a belligerent does not possess and a necessity that does not exist.

Foraging. § 141. Foraging consists in the collection by troops themselves of forage for horses, and of grain, vegetables, or animals as provision for men, from the fields or other places where the materials may be found. This practice is resorted to when from want of time it would be inconvenient to proceed by way of requisition. With it may be classed the cutting of wood for fuel or military use.

Booty. § 142. Booty consists in whatever can be seized upon land by a belligerent force, irrespectively of its own requirements, and simply because the object seized is the property of the enemy. In common use the word is applied to arms and munitions in the possession of an enemy force, which are confiscable as booty, although they may be private property; but rightly the term includes also all the property which has hitherto been mentioned as susceptible of appropriation.

Property in territorial waters of its own state. § 143. Enemy's property within the territorial waters of its own state is subject to the same rules which affect enemy's property in places not within the jurisdiction of any power.

Private property within the jurisdiction of the enemy. § 144. Property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, may be said to enjoy a practical immunity from confiscation; but its different kinds are not protected by customs of equal authority, and although seizure would always now be looked upon with extreme disfavour, it would be unsafe to declare that it is not generally within the bare rights of war.

Moneys lent to the state. In one case a strictly obligatory usage of exemption has no doubt been established. Money lent by individuals to a state is not confiscated and the interest payable upon it is not sequestrated. Whether this habit has been dictated by

self-interest, or whether it was prompted by the consideration that money so lent was given 'upon the faith of an engagement of honour, because a Prince cannot be compelled like other men in an adverse way by a Court of Justice,' it is now so confirmed that in the absence of an express reservation of the right to sequester the sums placed in its hands on going to war a state in borrowing must be understood to waive its right, and to contract that it will hold itself indebted to the lender and will pay interest on the sum borrowed under all circumstances. On one occasion only has the obligation been disregarded. In 1753 the King of Prussia, nominally by way of reprisal for the capture of Prussian vessels by British cruisers, seized certain funds which had been lent by English subjects upon the security of the Silesian revenues, and which he had bound himself to repay under the Treaties of Breslau and Dresden; but the statement of law which was drawn from the English government in reply to a memorial in which he endeavoured to justify the act met with such universal approval that the rule was indirectly strengthened by the attempt to infringe it, and it has never since been called in question <sup>1</sup>.

Real property, merchandise and other moveables, and incorporeal property other than debts due by the state itself, stand in a less favourable position. Although not appropriated under the usual modern practice they are probably not the subjects of a thoroughly authoritative custom of exemption. During the middle ages time was often given to merchants at the outbreak of war to withdraw with their goods from a belligerent country, but the indulgence was never transformed into a right, and at the beginning of the seventeenth century all kinds of property belonging to an enemy were habitually seized. In the course of that century milder practices began to assert themselves, and it became unusual to appropriate land, though its revenues were taken possession of during

<sup>1</sup> For the *Exposition des Motifs* of the king of Prussia and the answer of the English government, see De Martens, *Causes Cél.* iii. 106, 131, and 134.

**PART III.** the continuance of war, and confiscations sometimes occurred  
**CHAP. III.** so late as the war of the Spanish Succession. In the treaties of peace made in 1713 between France and Savoy, the United Provinces and the Empire, it was stipulated that confiscations effected during the preceding war should be reversed<sup>1</sup>. During the eighteenth century the complete appropriation of real property disappeared, but its revenues continued to be taken, or at least to be sequestrated; and property of other kinds was sometimes sequestrated and sometimes definitively seized. In order to guard in part against these effects of acknowledged law it was stipulated in many commercial treaties that a specified time varying from six months to a year should be allowed for the withdrawal of mercantile property on the outbreak of war; but property of other kinds was still governed by the general rule, and cases frequently occurred, owing to the absence of special stipulations, in which mercantile property was sequestrated or subjected to confiscation<sup>2</sup>. In the Treaties of Campo Formio, Luneville, Amiens, Friedrichshamm, Jönköping, and Kiel, and in those between France and Wurtemberg and France and Baden in 1796, and between Russia and Denmark in 1814, and between France and Spain in the same year, it

<sup>1</sup> Dumont. viii. i. 365, 367, 419.

<sup>2</sup> The following treaties to this effect were concluded in the latter half of the eighteenth century. England and Russia, 1766 (De Martens, Rec. i. 396); France and the United States, 1778 (id. ii. 596); the United States and the United Provinces, 1782 (id. iii. 445); Russia and Denmark, 1782 (ib. 482); the United States and Sweden, 1783 (ib. 576); the United States and Prussia, 1785 (id. iv. 47); Austria and Prussia, 1785 (ib. 82); England and France, 1786 (ib. 156); France and Russia, 1787 (ib. 217); Russia and the Two Sicilies, 1787 (ib. 245); Russia and Portugal, 1787 (ib. 335); Denmark and Genoa, 1789 (ib. 463); England and the United States, 1795 (ib. 684); England and Russia, 1797 (id. vi. 363); the United States and Prussia, 1799 (ib. 686). The treaty of 1786 between England and France, and that of 1795 between England and the United States, permitted the subjects of the respective states to continue their trade during war unless their conduct gave room for suspicion, in which case twelve months were to be allowed for winding up their affairs; and the latter treaty provided that in no case should 'debts due from individuals of the one nation to individuals of the other, nor shares, nor monies which they may have in the public funds or in the public or private banks,' be sequestrated.



was necessary to provide for the removal of sequestrations which had been placed upon incomes of private persons and upon debts<sup>1</sup>; at the commencement of war between England and Denmark in 1807, the former power seized and condemned the Danish ships lying in British waters, and the latter confiscated all ships, goods and debts within the kingdom which belonged to English subjects; in 1812 also the majority of the Supreme Court of the United States held that, though enemy property within the territory at the outbreak of war could not be condemned in the then state of the law of the United States, it was competent for the legislature to pass a law authorising confiscation, and Justice Story considered that no legislative act was necessary, and that 'the rule of the law of nations is that every such exercise of authority is lawful, and rests in the sound discretion of the nation<sup>2</sup>. Since the end of the Napoleonic wars the only instance of confiscation which has occurred was supplied by the American Civil War, in which the Congress of the Confederate States, by an Act passed in August 1861, enacted that 'property of whatever nature, except public stocks and securities held by an alien enemy since the 21st May 1861, shall be sequestered and appropriated<sup>3</sup>.' The custom which

PART III.  
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<sup>1</sup> De Martens, Rec. vi. 269, 279, 421, vii. 300, 411; Nouv. Rec. i. 27, 224, 674, 680; Hertlet, 36. The confiscation of English property in France in 1793 and the sequestration of English property by Russia in 1800 have not been instanced in the text, because, being in violation of the treaties of 1786 and 1797, they were mere acts of lawlessness.

<sup>2</sup> Wolff against Axholm, vi Maule and Selwyn, 92; Brown v. the United States, viii Cranch, 110. De Martens remarks, both in the early editions of his Précis, and in those which appeared down to 1822, that 'là où il n'y a point de lois ou de traités sur ce point, la conduite des puissances de l'Europe n'est rien moins qu'uniforme' (§ 268). Lord Ellenborough was obviously mistaken in saying in the course of his judgment in Wolff against Axholm that the 'Ordinance of the Court of Denmark stands single and alone, not supported by any precedent. . . . No instance of such confiscation except the Ordinance in question is to be found for more than a century.'

<sup>3</sup> Lord Russell to Acting Consul Cridland. State Papers, 1862, lxii. No. i. 108. All persons domiciled within the States with which the Confederate States were at war were held to be subject to the provisions of the Act. On this point Lord Russell remarked that 'whatever may have been the abstract



**PART III.** has become general of allowing the subjects of a hostile  
**CHAP. III.** state to reside within the territory of a belligerent during good behaviour brings with it as a necessary consequence the security of their property within the jurisdiction, other than that coming into territorial waters, and indirectly therefore it has done much to foster a usage of non-confiscation; but as it is not itself strictly obligatory, it cannot confer an obligatory force, and the treaties which contain stipulations in the matter, though numerous, are far from binding all civilised countries even to allow time for the withdrawal of mercantile property<sup>1</sup>.

rule of the Law of Nations in former times, the instances of its application in the manner contemplated in the Act of the Confederate Congress in modern and more civilised times, are so rare and have been so generally condemned that it may almost be said to have become obsolete.'

<sup>1</sup> Treaties concluded between England and the United States in 1806 (De Martens, Rec. viii. 591); England and Portugal in 1810 (id. Nouv. Rec. iii. 212); England and Rio de la Plata in 1825 (id. vi. 678); England and Colombia in 1825 (ib. 744); England and Mexico in 1826 (id. vii. 92); France and Brazil in 1828 (id. 613); Denmark and Mexico in 1827 (id. x. 15); the Netherlands and Mexico in 1827 (id. vii. 239); the Netherlands and Colombia in 1829 (id. ix. 587); the United States and Mexico in 1831 (id. x. 334); Prussia and Mexico in 1831 (id. iii. 544); France and Guatemala in 1848 (Nouv. Rec. Gén. xii. 6); England and Guatemala in 1849 (id. xiv. 294); Belgium and Guatemala in 1849 (ib. 339); England and Chile in 1854 (id. xvi. i. 510); and France and San Salvador in 1858 (id. xvi. ii. 150), stipulate either that 'merchants and other subjects' shall have the privilege of remaining and continuing their trade as long as their conduct does not render them objects of suspicion,' or that 'persons established in the exercise of trade or special employment' shall be allowed so to remain, other persons being given time to wind up their affairs. Treaties merely stipulating for a term during which the subjects of the contracting parties should be at liberty to withdraw with their property after the outbreak of war from the enemy's country have been concluded within the present century between Russia and Sweden in 1801 (De Martens, Rec. vii. 334), Prussia and Denmark in 1818 (id. Nouv. Rec. iv. 535), and the United States and Mexico in 1848 (id. xiv. 33). Finally, sequestration and confiscation have been expressly forbidden by a convention between the United States and France in 1800 (De Martens, Rec. vii. 100); and by treaties between the United States and Central America in 1825 (id. Nouv. Rec. vi. 837); the United States and Colombia in 1826 (ib. 1002); the United States and Brazil in 1828 (ib. ix. 64); the United States and Chile in 1832 (id. x. i. 447); the United States and Venezuela in 1836 (id. iv. 564); the United States and Peru-Bolivia in 1836 (id. vi. 123); the United States and Ecuador in 1839 (Nouv. Rec. Gén. iv. 319); and the United States and Guate-

Upon the whole, although, subject to the qualification made PART III.  
with reference to territorial waters, the seizure by a belli- CHAP. III.  
gerent of property within his jurisdiction would be entirely  
opposed to the drift of modern opinion and practice, the  
contrary usage, so far as personal property is concerned, was  
until lately too partial in its application, and has covered a  
larger field for too short a time to enable appropriation to be  
forbidden on the ground of custom as a matter of strict law;  
and as it is sanctioned by the general legal rule, a special rule  
of immunity can be established by custom alone. For the  
present therefore it cannot be said that a belligerent does  
a distinctly illegal act in confiscating such personal property  
of his enemies existing within his jurisdiction as is not secured  
upon the public faith; but the absence of any instance of con-  
fiscation in the more recent European wars, no less than the  
common interests of all nations and present feeling, warrant a  
confident hope that the dying right will never again be put in  
force, and that it will soon be wholly extinguished by disuse<sup>1</sup>.

*mala* in 1849 (id. xiv. 318); the United States and Peru in 1851 (id. xvi. i. 132); Zollverein and Mexico in 1855 (id. xvi. ii. 261); France and Honduras in 1856 (ib. 150); France and New Grenada in 1857 (ib. 164); Zollverein and the Argentine Republic in 1857 (ib. 321). It is to be noticed that, with scarcely an exception, one of the parties to each of the above treaties is a South American State. It might be argued not unfairly that if like treaties do not exist between European countries, and between them and the United States, it is because there has been for a long time little fear that the right guarded against would be exercised by well-regulated states.

<sup>1</sup> Some writers suggest that 'whenever a government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there, it tacitly promises protection and security' (Hamilton's *Letters of Camillus*, quoted by Woolsey, § 118, note); but, as is properly remarked by Dana (note to Wheaton, § 308), 'persons who either leave their property in another country or give credit to a foreign citizen, act on the understanding that the Law of Nations will be followed whatever that may be. To argue therefore that the rule under the Law of Nations must be to abstain from confiscation because the debt or property is left in the foreign country on the public faith of that country seems to be a *petitio principii*.'

It is evident that although it is within the bare rights of a belligerent to appropriate the property of his enemies existing within his jurisdiction, it can very rarely be wise to do so. Besides exposing his subjects to like measures on the part of his adversary, his action may cause them to be obliged to pay debts

PART III. § 145. Enemy property entering territorial waters after  
 CHAP. III. the commencement of war is subject to confiscation.

Property  
 entering  
 territorial  
 waters of  
 the enemy  
 after the  
 commence-  
 ment of  
 war.

Apart from an indulgence which has sometimes been granted in recent wars, and which will be mentioned in a later section<sup>1</sup>, the only exceptional practice which claims to be of some authority is one of exempting from capture shipwrecked vessels, and vessels driven to take refuge in an enemy's port by stress of weather or from want of provisions. There are one or two cases in which such exemption has been accorded. In 1746 an English man-of-war entering the Havana, and offering to surrender, was given means of repairing damages and was allowed to leave with a passport protecting her as far as the Bermudas; in 1799 a Prussian vessel called the *Diana* which had taken refuge in Dunkirk was restored by the French courts; and a few years afterwards an English frigate in distress off the mouth of the Loire was saved from shipwreck and allowed to leave without being captured. But a French Ordonnance of the year 1800 prescribed a contrary conduct, and in the same year the precedent of the *Diana* was reversed and a vessel

twice over. The fact of payment to him is of course no answer to a suit in the courts of the creditor's state; and property belonging to the debtor coming into the jurisdiction of the latter at a subsequent time might be seized in satisfaction of the creditor's claim.

For recent opinion upon the whole question of the rights of a belligerent with respect to property of his enemy within his jurisdiction, see Dana (Note to Wheaton, § 305), Woolsey (Intro. to Int. Law, § 118), Twiss (ii. § 56 and 59), Calvo (§ 721-7), Heffter (§ 140).

In delivering judgment in the case of the *Johanna Emilie* during the Crimean War Dr. Lushington said, 'With regard to an enemy's property coming to any port of the kingdom or being found there being seizable, I confess I am astonished that a doubt could exist on the subject. . . . There are many instances in which a capture has been made in port by non-commissioned captors. . . . If the property was on land, according to the ancient law it was also seizable; and certainly during the American War there were not wanting instances in which such property was seized and condemned by law. That rigour was afterwards relaxed. I believe no such instance has occurred from the time of the American War to the present day,—no instance in which property inland was subject to search or seizure, but no doubt it would be competent to the authority of the crown, if it thought fit.' Spinks, 14.

<sup>1</sup> § 148.

which had entered a French port under like circumstances was condemned. Some writers, without asserting that a rule of exemption exists, think that justice, or humanity, or generosity demand that a belligerent shall refuse to profit by the ill-fortune of his enemy. Whether this be so or not,—and in the case of a ship of war at any rate a generosity would seem to be somewhat misplaced which furbishes arms for an adversary, and puts them in his hands, without making any condition as to their use,—it is clear that a belligerent lies under no legal obligations in the matter<sup>1</sup>.

§ 146. In places not within the territorial jurisdiction of any power, that is to say for practical purposes, on non-territorial seas, property belonging to enemy subjects remains liable to appropriation, save in so far as the usage to this effect is derogated from by certain exceptional practices, to be mentioned presently.

§ 147. That the rule of the capture of private property at sea has until lately been universally followed, that it is still adhered to by the great majority of states, that it was recognised as law by all the older writers, and is so recognised by many late writers, is uncontested<sup>2</sup>. A certain amount of practice however exists of recent date in which immunity of private property from capture has been agreed to or affirmed; and a certain number of writers attack warmly, and sometimes intemperately, both the usage of capture itself, and the state which is supposed to be the chief obstacle to its destruction<sup>3</sup>. It becomes therefore

<sup>1</sup> Pistoye et Duverdy, ii. 89; Ortolan, *Dip. de la Mer*, liv. iii. ch. viii; Halleck, ii. 152; Calvo, § 932.

<sup>2</sup> The existing law will be found stated within the present century either with approval, or without disapproval, by De Martens (*Précis*, § 281), Kent (*Comm.* pt. i. lect. v), Klüber (§ 253-4), Wheaton (*Elem.* pt. iv. ch. ii. § 7), Manning (p. 183), Hautefeuille (*tit.* iii. ch. ii. sect. iii. § 1), Ortolan (*Dip. de la Mer*, liv. iii. ch. ii), Heffter (§ 137), Riquelme (i. 264), Twiss (ii. § 73), Phillimore (iii. § cccxlvii), Dana (*Notes to Wheaton's Elem.*, No. 171), Negrin (*tit.* ii. cap. iv).

<sup>3</sup> Vidari (*Del rispetto della proprietà privata fra gli stati in Guerra*), Calvo (§ 955), De Laveleye (*Du Respect de la Propriété Privée en Temps de Guerre*), Bluntschli (*Du Droit de Butin*, *Rev. de Droit Int.* tom ix. and x), Fiore

PART III. necessary to see what value can be attached to the practice  
 CHAP. III. in question and to the new doctrines.

Practice in  
 its favour.

Turning the attention first to practice and to indications of national opinion, the United States is found, under the presidency of Mr. Monroe, proposing to the governments of France, England, and Russia that merchant vessels and their cargoes belonging to subjects of belligerent powers should be exempted from capture by convention. Russia alone accepted the proposal in principle, but refused to act upon it until it had been also accepted by the maritime states in general. Again in 1856, Mr. Marcy, in refusing on the part of the United States to accede to the Declaration of Paris, by which privateering was abolished, stated that as it was a cardinal principle of national policy that the country should not be burdened with the weight of permanent armaments, the right of employing privateers must be retained unless the safety of the mercantile marine could be legally assured, but he offered to give it up if it were conceded that 'the private property of the subjects of one or other of two belligerent powers should not be subject to capture by the vessels of the other party, except in cases of contraband of war.' That the United States, as might be expected from its situation, has remained willing to consent to the abolition of the right to capture private property at sea, is shown by two more recent facts. In 1870 Mr. Fish expressed his hope to Baron Gerolt that 'the government and people of the United States may soon be gratified by seeing the principle' of the immunity of private property at sea 'universally recognised as another restraining and humanising influence imposed by modern civilisation on the art of war;' and in 1871 a treaty was concluded with Italy by which it is stipulated that private property shall not be seized except for breach of blockade or as contraband of war. Italy had already shown its own disposition in a decisive manner by passing a marine code

(Nouv. Droit Int. pt. ii. ch. vii, viii). M. F. Martens appears to have written a pamphlet in Russian on the subject.

in 1865, by which the capture of mercantile vessels of a hostile nation by Italian vessels of war is forbidden in all cases in which reciprocity is observed. Austria and Prussia on the outbreak of the war of 1866 declared that enemy ships and cargoes should not be captured so long as the enemy state granted a like indulgence, and hostilities were accordingly carried on both as between those states and as between Austria and Italy without the use of maritime capture. Finally, in 1870 the Prussian government issued an ordonnance exempting French vessels from capture without any mention of reciprocity<sup>1</sup>. In the above facts is comprised the whole of the international practice which can be adduced in favour of the new doctrine. They extend over a short time; they are supplied only by four states; to three out of these four the adoption of the doctrine as a motive of policy was recommended by their maritime weakness. Even therefore if it were not rash to assume that the views of the states in question would remain unchanged with a change in their circumstances, it is plain that up to now not only is there no practice of strength enough to set up a new theory in competition with the old rule of law, but that there are scarcely even the rudiments of such a practice.

Is there then any sound theoretical reason for abandoning the right to capture private property at sea? Its opponents declare that it is in contradiction to the fundamental principle

Its relation to the general principles of law.

<sup>1</sup> De Laveleye, *Du Respect de la Propriété Privée en Temps de Guerre*; Bluntschli, *Du Droit de Butin*, Rev. de Droit Int. vol. ix.

In 1870 France acted upon the established law; in January 1871, consequently, Prussia changed her attitude, and stated her intention to make captures (D'Angeberg, No. 971). So far of course she was within her rights. Unfortunately she did not confine herself to legal action. A fine of 100,000 francs was imposed on each of the occupied departments, and forty notables of Dijon, Gray, and Vesoul were sent as prisoners to Bremen by way of 'reprisal' for the confiscation of German vessels. War reprisals are not a mode of conducting ordinary hostilities; their use is limited to cases in which the enemy has violated the laws of war, and their use in any other case is in itself a violation of those laws. Of the two parties concerned it was the Germans and not the French who laid themselves open to reprisals; their offence was a grave one, and under other circumstances than those then existing it would probably have been severely punished.

PART III. that war is 'a relation of a state to a state, and not of  
 CHAP. III. an individual to an individual,' and that it constitutes the  
 sole important exception to the principle of the immunity  
 of private property from seizure, which is proclaimed to be  
 a corollary of the former principle, and to have been besides  
 adopted into international law by the consent of nations.  
 The value of the first of these two principles, and its claims  
 to form a part of international law, have been already ex-  
 amined in the chapter upon the general principles of the law  
 governing states in the relation of war. It may be judged  
 whether it is true that capture at sea is a solitary exception  
 to the immunity of private property in war by reading the  
 section upon contributions and requisitions in the present  
 chapter, together with the portion of the chapter on military  
 occupation which is there referred to as bearing upon the  
 assertion that contributions and requisitions are not a form  
 of appropriation of private property.

Its moral  
 aspect.

Finally, is there any moral reason for which maritime  
 states ought to abandon their right of capturing private  
 property at sea? Is the practice harsher in itself than  
 other common practices of war; or, if it be not so, is it  
 harsher in proportion to the amount of the stress which it  
 puts upon an enemy, and so to the amount of advantage  
 which a belligerent reaps from it? The question hardly  
 seems worth answering. It is needless to bring into com-  
 parison the measures which a belligerent takes for the main-  
 tenance of his control in occupied country, or to look at the  
 effects of a siege, or a bombardment, or any other operation  
 of pure military offence. It is enough to place the incidents  
 of capture at sea side by side with the practice to which it  
 has most analogy, viz. that of levying requisitions. By the  
 latter, which itself is relatively mild, private property is seized  
 under conditions such that hardship to individuals—and the  
 hardship is often of the severest kind—is almost inevitable.  
 In a poor country with difficult communications an army  
 may so eat up the food as to expose the whole population of



a large district to privations. The stock of a cloth or leather merchant is seized; if he does receive the bare value of his goods at the end of the war, which is by no means necessarily the case, he gets no compensation for interrupted trade and the temporary loss of his working capital. Or a farmer is taken with his carts and horses for weeks or months and to a distance of a hundred or two hundred miles; if he brings back his horses alive, does the right to ask his own government at some future time for so much daily hire compensate him for a lost crop, or for the damage done to his farm by the cessation of labour upon it? It must be remembered also that requisitions are enforced by strong disciplinary measures, the execution of which may touch the liberty and the lives of the population; and that in practice those receipts which are supposed to deprive requisitioning of the character of appropriation are not seldom forgotten or withheld. Maritime capture on the other hand, in the words of Mr. Dana, 'takes no lives, sheds no blood, imperils no households, and deals only with the persons and property voluntarily embarked in the chances of war, for the purposes of gain, and with the protection of insurance,' which by modern trading custom is invariably employed to protect the owner of property against maritime war risks, and which effects an immediate distribution of loss over a wide area. Mild however as its operation upon the individual is, maritime capture is often an instrument of war of a much more efficient kind than requisitioning has ever shown itself to be. In deranging the common course of trade, in stopping raw material on its way to be manufactured, in arresting importation of food and exportation of the produce of the country, it presses upon everybody sooner or later and more or less; and in rendering sailors prisoners of war it saps the offensive maritime strength of the weaker belligerent. In face of the results that maritime capture has often produced it is idle to pretend that it is not among the most formidable of belligerent weapons; and in face of obvious facts it is equally



PART III. idle to deny that there is no weapon the use of which causes  
 CHAP. III. so little individual misery.

Conclu-  
 sion.

Legally and morally only one conclusion is possible; viz. that any state which chooses to adhere to the capture of private property at sea has every right to do so<sup>1</sup>.

Exceptions  
 to the  
 rule that  
 private  
 property  
 at sea  
 may be  
 captured.

§ 148. The chief and most authoritative exception to the rule that enemy's goods at sea are liable to capture is made in favour of cargo shipped on board neutral vessels, which by an artificial doctrine are regarded as having power to protect it. As the modern usage in the matter forms a concession to neutrals, and has arisen out of the relation between them and belligerents, it will be convenient to treat of it together with the rest of the law belonging to that relation; and the only exceptions which claim to be noticed here are, the more doubtful one which exempts from seizure boats engaged in coast-fishing, and an occasional practice under which enemy's vessels laden with cargoes for a port of the belligerent are allowed to enter the latter and to reissue from it in safety.

<sup>1</sup> The question whether it is wise for states in general, or for any given state, to agree as a matter of policy to the abolition of the right of capture of private property at sea is of course entirely distinct from the question of right. It may very possibly be for the common interests that a change in the law should take place; it is certainly a matter for grave consideration whether it is not more in the interest of England to protect her own than to destroy her enemies' trade. Quite apart from dislike of England, and jealousy of her maritime and commercial position, there is undoubtedly a good deal of genuine feeling on the continent of Europe against maritime capture. It is not clear how far the latter is strong and general, but it is not unlikely that there is enough of it to afford convenient material for less creditable motives to ferment; and contingencies are not inconceivable in which, if England were engaged in a maritime war, European or other states might take advantage of a set of opinion against her practice at sea to embarrass her seriously by an unfriendly neutrality. The evils of such embarrassment might perhaps be transient; but there are also conceivable contingencies in which the direct evils of maritime capture might be disastrous. English manufactures are dependent on the cheap importation of raw material, and English population is becoming yearly more and more dependent on foreign food. In the *Contemporary Review* for 1875 (vol. xxvi. p. 737-51) I endeavoured to show that there are strong reasons for doubting whether England is prudent in adhering to the existing rule of law with respect to the capture of private property at sea. The reasons which were then urged have certainly not grown weaker with the progress of time.

The doctrine of the immunity of fishing-boats is mainly **PART III.** founded upon the practice with respect to them with which **CHAP. III.** France has become identified, but which she has by no means **Fishing-boats.** invariably observed. During the Anglo-French wars of the middle ages it seems to have been the habit of the Channel fishermen not to molest one another, and the French Ordonnances of 1543 and 1584, which allowed the Admiral of France to grant fishing-truces to subjects of an enemy on condition of reciprocity, did no more than give formal effect to this custom. It does not appear to what degree the power vested in the Admiral was used during the early part of the seventeenth century, but by the Ordonnances of 1681 and 1692 fishing-boats were subjected to capture, and from that time until the war of American Independence both France and England habitually seized them. Throughout that war and in the beginning of the revolutionary wars both parties refrained from disturbing the home fisheries, but the English government in 1800 distinctly stated that in its view the liberty of fishing was a relaxation of strict right made in the interests of humanity, and revocable at any moment for sufficient reasons of war. The attitude of the French government is less clear. Napoleon no doubt complained that the seizure of fishing-boats was 'contrary to all the usages of civilised nations,' but as his declaration was made after the English government had begun to capture them on the ground that they were being used for warlike purposes, it may probably be looked upon less as an expression of a settled French policy than as one of those utterances of generous sentiment with which he was not unaccustomed to clothe bad faith. At a later time during the wars of the Empire the coast fisheries were left in peace<sup>1</sup>. The United States followed the

<sup>1</sup> Pardessus, Col. de Lois Marit. iv. 319; Ortolan, Dip. de la Mer, liv. iii. ch. ii; De Martens, Rec. vi. 511-14. The English courts gave effect to the doctrine of the English government; the French courts, on the other hand, appear to have considered the immunity of fishing-vessels to exist as of right. Lord Stowell said, 'In former wars it has not been usual to make captures of these small fishing-vessels; but this was a rule of comity only, and not of legal

PART III. same practice in the Mexican war; and France in the  
 CHAP. III. Crimean, Austrian, and German wars prohibited the capture  
 of fishing-vessels for other than military and naval reasons<sup>1</sup>.

In the foregoing facts there is nothing to show that much real difference has existed in the practice of the maritime countries. England does not seem to have been unwilling to spare fishing-vessels so long as they are harmless, and it does not appear that any state has accorded them immunity under circumstances of inconvenience to itself. It is likely that all nations would now refrain from molesting them as a general rule, and would capture them so soon as any danger arose that they or their crews might be of military use to the enemy; and it is also likely that it is impossible to grant them a more distinct exemption. It is indisputable that coasting fishery is the sole means of livelihood of a very large number of families as inoffensive as cultivators of the soil or mechanics, and that the seizure of boats, while inflicting extreme hardship on their owners, is as a measure of general application wholly ineffective against the hostile state. But it must at the same time be recognised that fishing-boats are sometimes of great military use. It cannot be expected that a belligerent, if he finds that they have been employed by his enemy, will not protect himself against further damage by seizing all upon which he can lay his hands; nor that he will respect them under circumstances which render their employment probable. The order to capture French fishing-boats given by the British government in 1800 was caused by the use of some as fire-vessels against the English squadron at Flushing, and of others decision; it has prevailed from views of mutual accommodation between neighbouring countries and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment, and as they are brought before me for my judgment they must be referred to the general principles of this court. . . . They are ships constantly and exclusively employed in the enemy's trade.' *The Young Jacob and Johanna*, 1 Rob. 20. *La Nostra Signora de la Piedad y Animas*, Pistoye et Duverdy, 1. 331.

<sup>1</sup> Calvo, ii. § 932.

with their crews to assist in fitting out a fleet at Brest; and it was intended that between 500 and 600 should form part of the flotilla destined for the invasion of England<sup>1</sup>. Any immunity which is extended to objects on the ground of humanity or of their own innocuousness, must be subject to the condition that they shall not be suddenly converted into noxious objects at the convenience of the belligerent; and it is not probable that states will consent to forego the advantages which they may derive from the use of their fishing-vessels in contingencies which cannot always be foreseen<sup>2</sup>.

It has never been contended, except by the French at the beginning of the present century, that vessels engaged in deep-sea fishing are exempt from capture.

Enemy's vessels which at the outbreak of war are on their voyage to the port of a belligerent from a neutral or hostile country, and even vessels which without having issued from an enemy or other foreign port have commenced lading at that time, are occasionally exempted from capture during a specified period. At the beginning of the Crimean war an Order in Council directed that 'any Russian merchant vessel which prior to the date of this Order shall have sailed from any foreign port bound for any port or place in her Majesty's dominions, shall be permitted to enter such port or place and to discharge her cargo, and afterwards forthwith to depart without molestation, and that any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.' France gave a like indulgence; and in 1870 German vessels which had begun to lade upon the date of the declaration of war were allowed to enter French ports without limit of time, and to reissue with a safe-conduct to a German port<sup>3</sup>.

Enemy's  
vessels on  
their  
voyage at  
the out-  
break of  
war to a  
belligerent  
port, &c.

<sup>1</sup> De Martens, Rec. vi. 505; Corresp. de Nap. i. viii. 483.

<sup>2</sup> M. Calvo (loc. cit.) seems to think that the principle of immunity is settled, and M. Heffter (§ 137) states the rule absolutely. M. Bluntschli (§ 667) considers that fishing-boats can only be captured while being actually used for a military purpose.

<sup>3</sup> *London Gazette*, March 29, 1854; Pistoye et Duverdy, i. 123; D'Angeberg,

## PART III.

## CHAP. III.

What constitutes a valid capture, and its effect.

§ 149. It being the right of a belligerent sovereign to appropriate under specified conditions certain kinds of moveable property belonging to his enemy, the effectual seizure of such property in itself transfers it to him. Beyond this statement it is needless for legal purposes to go as between the captor and the original owner, because possession is evidence that an act of appropriation has been performed the value of which an enemy can always test by force. But it is possible for persons other than the captor or the owner to acquire interests in the property seized through its recapture, or through its transfer by the appropriator to a neutral or a friend; and as no one can convey a greater interest than he himself possesses, the existence of such interests depends upon whether the belligerent in the particular case has not only endeavoured to appropriate the property, but has given clear proof of his ability to do so. If objects which have duly passed to the captor are recaptured by an ally of the owner, they become the prize or booty of the recaptor, but if change of ownership has not taken place, they must be restored to the original possessor. So also if the original owner in the course of his war finds the objects which he has lost in the hands of a co-belligerent or a neutral, he may inquire whether they were effectually seized, and if not he may reclaim them. Thus it becomes necessary to determine in what effectual seizure consists. To do this broadly is sufficiently easy. It is manifest that momentary possession, although coupled with the intention-to appropriate the captured objects, affords no evidence of ability to retain them, and that a presumption of such ability can only be raised either by an acknowledgment of capture on the

Nos. 194, 224, 326. In 1870 England objected that in according this privilege an injustice was done to neutrals, since German ships bound for neutral ports or inversely remained liable to capture for due cause from the day of the commencement of war. Equity appears certainly to demand that if a belligerent for his own convenience spares enemy's ships laden with cargoes destined for him, he should not put neutrals to inconvenience who have not had an opportunity of sending their goods in vessels which are free from liability to capture.

part of the owner, as when a vessel hauls down her flag in token of surrender, or by proof from the subsequent course of events that the captor, at the time of seizure, had a reasonable probability of keeping his booty or prize. But the latter test is in itself vague. It can only be applied through a more or less arbitrary rule, and consequently, as is usual in such cases, considerable varieties of practice have been adopted at different times and by different nations.

In the Middle Ages a captor seems, under the more authoritative usage, to have acquired property in things seized by him on their being brought within his camp, fortress, port, or fleet. The Consolat del Mar provided that if a vessel was retaken before arriving in a place of safety, it was to be given up to the owners on payment of reasonable salvage; if afterwards, it belonged to the recaptors; and Ayala in the end of the sixteenth century lays down unreservedly that booty belongs to the captor when it has entered within his lines<sup>1</sup>. Before that time however a practice had become very general under which a captor was regarded as not acquiring ownership of a vessel or booty until after possession during twenty-four hours. This view found expression in a French Edict of 1584; it was very early translated into a custom of England, Scotland, and Spain; it seems to have been adopted by the Dutch in the first years of the Republic; and was taken in Denmark with respect to captured vessels<sup>2</sup>. In the seventeenth century

<sup>1</sup> Consolat del Mar; Pardessus, Col. de Lois Marit. ii. 338-9 and 346; Ayala, De Jur. et Off. Bell. lib. i. c. ii. § 37; Albericus Gentilis, De Jure Belli, lib. iii. c. 17; Chief Justice Hale, Concerning the Customs of Goods exported and imported, Hargrave's Tracts, vol. i. The principle is that which was applied by Roman law to persons captured by an enemy: 'Antequam in praesidia perducatur hostium manet civis.'

<sup>2</sup> Pardessus, iv. 312; Hale, Customs of Goods, Hargrave's Tracts, i. 246; Grotius, De Jure Belli et Pacis, lib. iii. ch. vi. § 3, and Barbeyrac's note; Twiss, § 173. The rule is said to have been derived from, and may at least have a common origin with, a game law of the Lombards, under which a hunter might recover possession during twenty-four hours of an animal killed or wounded by him.

PART III. therefore it was on the way to become the ground of an  
 CHAP. III. authoritative rule. From that period how it has become  
 continuously less and less general. A larger number of  
 writers attribute an equal or greater authority to the opinion  
 that property is lost by an owner only when the captured  
 object has reached a place of safe custody; and as in countries  
 governed by the Code Napoleon 'possession gives title in  
 respect of moveables,' the rule that security of possession  
 is the test of the acquisition of property is more in consonance  
 with the municipal law of France and of the states which  
 have usually followed its example in matters of International  
 Law than the arbitrary rule of twenty-four hours; finally, the  
 latter was abandoned by England in the seventeenth century<sup>1</sup>.

Rule that  
 the cap-  
 tured pro-  
 perty must  
 be brought  
 into a place  
 of safe  
 custody.

Probably therefore it may now be said that, in so far as  
 exceptional practices have not been formed, property in  
 moveables is transferred on being brought into a place so  
 secure that the owner can have no immediate prospect of  
 recovering them. An exceptional mode of dealing with  
 recaptured vessels has however become common, under which  
 the transfer of property effected by capture is ignored as  
 between the recaptor and the original owner, and therefore as  
 the right to make direct seizure of property in continental  
 warfare is now restricted within narrow limits, the general  
 rule has been reduced to slight importance<sup>2</sup>.

<sup>1</sup> Zouch (*Juris Fecialis Explicatio*, pars ii. sect. viii), and Molloy (*De Jure Maritimo*, bk. i. c. 1. § 12) in the seventeenth century, Bynkershoek (*Quæst. Jur. Pub. lib. i. c. iv*), Wolff (*Jus Gentium*, § 860), and Vattel (*liv. iii. ch. xii. § 196*), in the eighteenth century, state the rule of deposit in a safe place absolutely. Lampredi (*Jur. Pub. Theoremata*, pars iii. ch. xiii. § 6) and Klüber (§ 254) thought that the twenty-four hours' rule had been established by custom. De Martens thinks that it is authoritative in continental warfare, but remarks that both practices are adopted at sea. Wheaton (*Elem. pt. iv. ch. ii. § 11*) mentions the two rules as alternative. Heffter (§ 136) says that the twenty-four hours' term 'a passé en usage chez quelques nations dans les guerres terrestres et maritimes. Toutefois il ne laisse pas de présenter certaines difficultés dans l'application, et il ne saurait être regardé comme une règle commune du droit international.' Lord Stowell considered that 'a bringing *infra præsidia* is probably the true rule' at sea; *The Santa Cruz*, 1 Rob. 60.

<sup>2</sup> See § 166.



If capture, in order to be effectual, must be proved by **PART III.**  
 a certain firmness of possession, it is evidently still more **CHAP. III.**  
 necessary that the captor shall show an intention to seize and **Evidence**  
 retain his prize or booty. With respect to the latter no **of inten-**  
 difficulty can arise. The fact of custody, when it exists at **tion to**  
 all, can be easily recognised. But a prize is often necessarily **retain pos-**  
 separated from the ship which has taken it, and though it is **session.**  
 the usual, and where possible the obvious course, to secure a  
 captured vessel by putting a prize-crew in her of sufficient  
 strength to defeat any attempt at rescue, it may under some  
 circumstances be impossible to spare a sufficient force, or even  
 to place it on board. Hence a maritime captor is allowed  
 to indicate his intention to keep possession by any act from  
 which such intention may fairly be inferred. It has been  
 held that he can establish his right of property as against  
 subsequent captors by sending a single man on board, although  
 the latter may exercise no control, and may not interfere  
 with the navigation of the ship. So also when a vessel has  
 been brought to, and obliged to wait for orders, and to obey  
 the direction of the captor, but owing to the boisterousness  
 of the weather has received no one on board, he has been  
 considered to have taken effectual possession<sup>1</sup>.

§ 150. As the property in an enemy's vessel and cargo is **Disposal of**  
 vested in the state to which the captor belongs so soon as **captured**  
 an effectual seizure has been made, they may in strictness **property.**  
 be disposed of by him as the agent of his state in whatever  
 manner he chooses<sup>2</sup>. So long as they were clearly the  
 property of the enemy at the time of capture, it is immaterial  
 from the point of view of International Law whether the  
 captor sends them home for sale, or destroys them, or releases

<sup>1</sup> The *Grotius*, ix Cranch, 370 ; The *Resolution*, vi Rob. 21 ; The *Edward and Mary*, iii Rob. 306.

<sup>2</sup> It is the invariable modern custom for the state to cede its interest in vessels belonging to private owners to the actual captors, and the property so ceded does not vest until adjudication has been made by a competent tribunal ; but this is merely an internal practice, designed to prevent abuses, and has no relation to the date at which the property of the state is acquired.



PART III. them upon ransom. But as the property of belligerents is  
 CHAP. III. often much mixed up with that of neutrals, it is the universal  
 General rule that it shall be brought into port for adjudication. practice for the former to guard the interests of the latter, by requiring captors as a general rule to bring their prizes into port for adjudication by a tribunal competent to decide whether the captured vessel and its cargo are in fact wholly, or only in part, the property of the enemy<sup>1</sup>. And though the right of a belligerent to the free disposal of enemy property taken by him is in no way touched by the existence of the practice, it is not usual to permit captors to destroy or ransom prizes, however undoubted may be their ownership, except when their retention is difficult or inconvenient.

Destruction.

Perhaps the only occasions on which enemy's vessels have been systematically destroyed, apart from any serious difficulty in otherwise disposing of them, were during the American revolutionary war and that between Great Britain and the United States in 1812-14. On the outbreak of the latter war the American government instructed the officers in command of squadrons to 'destroy all you capture, unless in some extraordinary cases that shall clearly warrant an exception.' 'The commerce of the enemy,' it was said, 'is the most vulnerable point of the enemy we can attack, and its destruction the main object; and to this end all your efforts should be directed. Therefore, unless your prizes should be very valuable and near a friendly port, it will be

<sup>1</sup> Although the practice now exists for the benefit of neutrals, its origin is due to the fact that formerly the state abandoned a part only of the value of prizes to the actual captors. In Spain the enactment in the *Partidas* of 1266, which reserved a fifth of all prizes to the king 'por razon de señorio' (tit. xxvi. ley xxix, *Pardessus*, vi. 30), remained in force till after the time of Grotius. The Dutch government also took a fifth (Grotius, *De Jure Belli et Pacis*, lib. iii. cap. vi. § 24). In France the Admiralty claimed the tenth share of every prize until the war of 1756, when it was remitted for the first time to the captors (Valin, *Ord. de la Marine*, liv. iii. tit. ix. art. 32); and as in England a proclamation issued in May of that year gave 'sole interest in and property of every ship and cargo to the officers and seamen on board his Majesty's ships from and after the 17th of that month' during the continuance of the war with France (Entick's *Hist. of the Late War*, i. 414), it may be inferred that the Crown took a share at least in the prizes made during 1755 and the early part of 1756.

imprudent and worse than useless to attempt to send them in. A single cruizer, if ever so successful, can man but few prizes, and every prize is a serious diminution of her force; but a single cruizer destroying every captured vessel has the capacity of continuing in full vigour her destructive power, so long as her provisions and stores can be replenished, either from friendly ports or from the vessels captured.' Under these instructions seventy-four British merchantmen were destroyed<sup>1</sup>. The destruction of prizes by the ships commissioned by the Confederate States of America was not parallel because there were no ports into which they could take them with reasonable safety; and the practice of the English and French navies has always been to bring in captured vessels in the absence of strong reasons to the contrary<sup>2</sup>.

PART III.  
CHAP. III.

<sup>1</sup> Mr. Bolles, Solicitor to the Navy; quoted in Parl. Papers, America, No. 2, 1873, p. 92.

<sup>2</sup> The view taken in the English courts as to the circumstances under which vessels should be destroyed may be illustrated from the judgment of Lord Stowell in the case of the *Felicity* (ii Dodson, 383): 'The captors fully justify themselves to the law of their own country which prescribes the bringing in, by showing that the immediate service in which they were engaged, that of watching the enemy's ship of war, the *President*, with intent to encounter her, though of inferior force, would not permit them to part with any of their own crew to carry her into a British port. Under this collision of duties nothing was left but to destroy her, for they could not, consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested. If impossible to bring in, their next duty is to destroy, enemy's property.' During the Crimean War Dr. Lushington said, 'it may be justifiable or even praiseworthy in the captors to destroy an enemy's vessel. Indeed the bringing into adjudication at all of an enemy's vessel is not called for by any respect to the right of the enemy proprietor, where there is no neutral property on board.' The *Leucade*, Spinks, Adm. Rep. 221. By the French Ordonnance of 1681 a captor '*ne pouvant se charger du vaisseau pris*' was allowed to destroy it. The circumstances enumerated by Valin as justifying this course are '*lorsque la prise est de peu de valeur, ou qu'elle n'est pas assez considérable pour mériter d'être envoyée dans un lieu de sûreté; surtout s'il fallait pour cela affaiblir l'équipage du corsaire au point de ne pouvoir plus continuer la course avec succès;*' and '*lorsque la prise est si délabrée par le combat ou par le mauvais temps qu'elle fait assez d'eau pour faire craindre qu'elle ne coule bas; lorsque le navire pris marche si mal qu'il expose l'armateur corsaire à la reprise; ou lorsque le corsaire, ayant aperçu des vaisseaux de guerre ennemis, se trouve obligé de prendre la fuite et que sa prise le retarde trop ou fait craindre une révolte.*' Ord. de la Marine, ii. 281. In 1870 a

PART III.  
CHAP. III.

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It is at the same time impossible to ignore the force of the consideration suggested by the government of the United States in the latter part of the foregoing extracts. It would be unwise to assume that a practice will be invariably maintained which has been dictated by motives not necessarily of a permanent character. Self-interest has hitherto generally combined with tenderness towards neutrals to make belligerents unwilling to destroy valuable property; but the growing indisposition of neutrals to admit prizes within the shelter of their waters, together with the wide range of modern commerce, may alter the balance of self-interest, and may induce belligerents to exercise their rights to the full<sup>1</sup>.

**Ransom.** § 151. Ransom is a repurchase by the original owner of the property acquired by the seizure of a prize. As the agreement to ransom is a voluntary act on his part, and as he can always allow his vessel to be sent in for adjudication or to be destroyed, it must be supposed to be advantageous to him; the crew also is released under it, instead of becoming

French ship of war destroyed two German vessels, because from the large number of prisoners whom she had on board she was unable safely to detach prize crews. A claim for restitution in value being made by the owners, the prize court determined '*qu'il résultait des papiers de bord et de l'instruction que ces bâtiments appartenaient à des sujets allemands, que leur prise était donc bonne et valable; que la destruction ayant été causée par force majeure pour conserver la sûreté des opérations du capteur, il n'y avait pas lieu à répartition au profit des capturés; qu'en agissant comme ils avaient fait, les capteurs avaient usé d'un droit rigoureux sans doute, mais dont l'exercice est prévu par les lois de la guerre et recommandé par les instructions dont ils étaient porteurs.*' Calvo, § 1242.

<sup>1</sup> Some authorities appear to look upon the destruction of captured enemy's vessels as an exceptionally violent exercise of the extreme rights of war. M. Bluntschli says that '*l'anéantissement du navire capturé n'est justifiable qu'en cas de nécessité absolue, et toute atteinte à ce principe constituerait une violation du droit international*' (§ 672), and Dr. Woolsey calls '*the practice a barbarous one, which ought to disappear from the history of nations*' (note 13). It is somewhat difficult to see in what the harshness consists of destroying property which would not return to the original owner, if the alternative process of condemnation by a prize court were suffered. It has passed from him to the captor, and if the latter chooses rather to destroy than to keep what belongs to himself, persons who have no proprietary interest in the objects destroyed have no right to complain of his behaviour. Destruction of neutral vessels or of neutral property on board an enemy's vessel would be a wholly different matter.

prisoners of war. The practice therefore constitutes a distinct mitigation of the extreme rights of capture <sup>1</sup>.

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CHAP. III.

When a vessel is released upon ransom the commander gives a Ransom Bill, by which he contracts for himself and the owner of the vessel and cargo that a stipulated sum shall be paid to the captor. A copy of the ransom bill is retained by himself, and serves as a safe-conduct protecting the vessel from seizure by ships of the enemy country or its allies, so long as a prescribed course is kept for a port of destination agreed upon. If the ransomed vessel voluntarily diverges from her course, or exceeds the time allowed for her voyage in the ransom bill, she becomes liable to be captured afresh, and any excess of value realised from her sale over the amount stipulated for in the bill then goes to the second captors; if on the other hand she is driven from her course or delayed by stress of weather, no penalty is incurred. The captor on his side, besides holding the ransom bill, usually keeps an officer of the prize as a hostage for the payment of the stipulated sum. If on his way to port, with the bill and hostage or either of them on board, he is himself captured, the owner of the prize is exonerated from his debt<sup>2</sup>; but as the bill and hostage are the equivalent of

<sup>1</sup> The same reasons for which ransom is a mitigation of the rights of war, cause most nations to be unwilling to allow captors to receive it. In England captors were formerly liable to fines for liberating a prize on ransom, unless the Court of Admiralty could be satisfied that 'the circumstances of the case were such as to have justified' the act. With respect to English ships captured by an enemy, the sovereign in council may permit or forbid contracts for ransom by orders issued from time to time, and any person entering into such contract in contravention of an order so issued may be fined to the extent of five hundred pounds. In France public vessels of war appear not to be prohibited from ransoming ships which they may have taken, but privateers could only do so with the consent of the owners. Spain allows ransom to be received by privateers which have taken three prizes, and which may therefore be assumed not to be in a condition to spare any portion of their crew. Russia, Sweden, Denmark, and the Netherlands wholly forbid the practice. The United States, on the other hand, permit contracts for ransom to be made in all cases. 27 and 28 Viet. c. 25; Règlement of 1803, De Martens, Rec. viii. 18; Twiss, ii. § 183; Calvo, § 967; Pistoye et Duverdy, i. 280.

<sup>2</sup> Twiss (ii. § 181), referring to Emérigon, Traité des Assurances, c. 12. sect.

PART III. the prize, this consequence does not follow from his capture  
 CHAP. III. if both have previously arrived in a place of safety.

Foreign maritime tribunals rank arrangements for ransom among *commercias belli*; hence they allow the captor to sue directly upon the bill if the ransom is not duly paid. The English courts refuse to except such arrangements from the effect of the rule that the character of an alien enemy carries with it a disability to sue, and compel payment of the debt indirectly through an action brought by the imprisoned hostage for the recovery of his freedom<sup>1</sup>.

Loss of  
property  
acquired  
by capture.

§ 152. The property acquired through effectual seizure by way of booty or prize is divested by recapture or abandonment, and in the case of prize it is also lost by escape, rescue by the crew of the prize itself, or discharge. The effect of abandonment when the property is found and brought into port by neutral salvors is perhaps not conclusive. By the courts of the United States at any rate it has been held that the neutral Court of Admiralty has jurisdiction to decree salvage, but cannot restore the property to the original belligerent owners, it being considered that by the capture the captors acquire such a right of property as no neutral nation can justly impugn or destroy; consequently the proceeds, after deducting salvage, belong to the original captors, and neutral nations ought not to inquire into the validity of a capture between belligerents<sup>2</sup>.

23. § 8. But, as is remarked by Dr. Woolsey, who nevertheless acknowledges the authority of the practice, 'why, if the first captor had transmitted the bill, retaining the hostage who is only collateral security, should not his claim be still good?' *Introd. to Int. Law*, § 142.

<sup>1</sup> On the whole subject see Twiss, ii. § 180-2; Calvo, § 969-73; Wheaton, *Elem.* pt. iv. ch. ii. § 28; Valin, *Ord. de la Marine*, liv. iii. tit. ix. art. xix. *Anthon v. Fisher*, ii Douglas, 650, note, and the *Hoop*, i Rob. 200, give the principles on which the English courts proceed.

If a ransomed vessel is wrecked the owner is naturally not exonerated from payment of the ransom.

<sup>2</sup> *The Mary Ford*, iii Dallas, 188.

## CHAPTER IV.

### MILITARY OCCUPATION.

§ 153. WHEN an army enters a hostile country, its advance PART III.  
by ousting the forces of the owner puts the invader into CHAP. IV.  
possession of territory, which he is justified in seizing under Nature of  
his general right to appropriate the property of his enemy. military  
But he often has no intention of so appropriating it, and occupation  
even when the intention exists there is generally a period in its *prima*  
during which, owing to insecurity of possession, the act of *facie as-*  
appropriation cannot be looked upon as complete. In such *pect.*  
cases the invader is obviously a person who temporarily  
deprives an acknowledged owner of the enjoyment of his  
property; and logically he ought to be regarded either as  
putting the country which he has seized under a kind of  
sequestration<sup>1</sup>, or, in stricter accordance with the facts, as  
being an enemy who in the exercise of his rights of violence  
has acquired a local position which gives rise to special  
necessities of war, and which therefore may be the foundation  
of special belligerent rights.

§ 154. Self-evident as may seem to be this view of the Theories  
position of an invader, when the intention or proved ability with re-  
to appropriate his enemy's territory is wanting, it was entirely spect to it.  
overlooked in the infancy of international law. An invader  
on entering a hostile country was considered to have rights

<sup>1</sup> This is the view taken by Heffter (§ 131).

PART III  
CHAP. IV.

Confusion  
of it with  
conquest  
down to  
the middle  
of last  
century.

explicable only on the assumption that ownership and sovereignty are attendant upon the bare fact of possession. Occupation, which is the momentary detention of property, was confused with conquest, which is the definitive appropriation of it. Territory, in common with all other property, was supposed, in accordance with Roman Law, to become a *res nullius* on passing out of the hands of its owner in war; it belonged to any person choosing to seize it for so long as he could keep it. The temporary possession of territory therefore was regarded as a conquest which the subsequent hazards of war might render transient, but which while it lasted was assumed to be permanent. It followed from this that an occupying sovereign was able to deal with occupied territory as his own, and that during his occupation he was the legitimate ruler of its inhabitants.

Down to the middle of the eighteenth century practice conformed itself to this theory. The inhabitants of occupied territory were required to acknowledge their subjection to a new master by taking an oath, sometimes of fidelity, but more generally of allegiance<sup>1</sup>, and they were compelled, not merely to behave peaceably, but to render to the invader the active services which are due to the legitimate sovereign of a state. Frederic II, in his General Principles of War, lays down that 'if an army takes up winter quarters in an enemy's country it is the business of the commander to bring it up to full strength; if the local authorities are willing to hand over recruits, so much the better, if not, they are taken by force;' and the wars of the century teem with instances in which such levies were actually made<sup>2</sup>. Finally,

<sup>1</sup> In the seventeenth century express renunciation of fealty to the legitimate sovereign was sometimes exacted. During the decadence of the usage in the eighteenth century an oath of allegiance was perhaps not required unless it was intended to retain the territory, and the promise of fidelity and obedience may have been taken as sufficient when it was wished to leave its fate in uncertainty. Swedish Intelligencer, pt. ii. 4; Moser, Versuch, ix. i. 231, 280, and ix. ii. 27; Memorial of the Elector of Hanover to the Diet of the Empire, Entick, Hist. of the late War, ii. 425; De Martens, Précis, § 280; Heffter, § 132.

<sup>2</sup> Œuvres de Fred. II, xxviii. 91. In 1743 Bavarian militia were used by

the territory itself was sometimes handed over to a third power while the issue of hostilities remained undecided; as in the case of the Swedish provinces of Bremen and Verden, which were sold by the King of Denmark during the continuance of war to the Elector of Hanover<sup>1</sup>.

After the termination of the Seven Years' War these violent usages seem to have fallen into desuetude, and at the same time indications appear in the writings of jurists which show that a sense of the difference between the rights consequent upon occupation and upon conquest was beginning to be felt. In saying that a sovereign only loses his rights over territory which has fallen into the hands of an enemy on the conclusion of a peace by which it is ceded, Vattel abandons the doctrine that territory passes as a *res nullius* into the possession of an occupant, and in effect throws back an intrusive foe for a justification of such acts of authority as he may perform within a hostile country upon his mere right of doing whatever is necessary to bring the war to a successful conclusion<sup>2</sup>. But the principle which was thus admitted by implication was not worked out to its natural results. While the continuing sovereignty of the original owner became generally recognised for certain purposes, for other purposes the occupant was supposed to put himself temporarily in his place. The original national character of the soil and its inhabitants remained unaltered; but the invader was invested with a quasi-sovereignty, which gave him a claim as of right to the obedience of the conquered population, and the exercise of which was limited only by

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Doctrine  
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the Austrians to fill up gaps in their Italian armies; in 1756 the Prussians on breaking into Saxony immediately required the States, who were in session, to supply 10,000 men, and two years afterwards 12,000 more were demanded. In 1759 the French made levies in Germany. Moser, Versuch, ix. i. 296, 389. It was sometimes necessary to stipulate on the conclusion of peace for the restitution of men taken in this manner. See, for example, art. 8 of the Peace of Hubertsburg, De Martens, Rec. i. 140.

<sup>1</sup> Lord Stanhope, Hist. of England, ch. vii.

<sup>2</sup> Vattel, liv. iii. ch. xiii. § 197. Lampredi takes the same view, Jur. Pub. Univ. Theorem. pt. iii. c. xiii. § 6.



PART III. the qualifications, which gradually became established, that  
 CHAP. IV. — he must not as a general rule modify the permanent institutions of the country, and that he must not levy recruits for his army. The first portion of this self-contradictory doctrine, besides being a commonplace of modern treaties, has, in several countries, been expressly affirmed by the courts. In 1808, when the Spanish insurrection against the French broke out, Great Britain, which was then at war with Spain, issued a proclamation that all hostilities against that country should immediately cease. A Spanish ship was shortly afterwards captured on a voyage to S. Andero, a port still occupied by the French, and was brought in for condemnation. In adjudicating upon the case Lord Stowell observed: ‘Under these public declarations of the state establishing this general peace and amity, I do not know that it would be in the power of the Court to condemn Spanish property, though belonging to persons resident in those parts of Spain which are at the present moment under French control, except under such circumstances as would justify the confiscation of neutral property.’ In France the Cour de Cassation has had occasion to render a decision of like effect. In 1811, during the occupation of Catalonia, a Frenchman accused of the murder of a Catalan within that province was tried and convicted by the assize Court of the Department of the Pyrénées Orientales. Upon appeal the conviction was quashed, on the ground that the courts of the territory within which a crime is perpetrated have an exclusive right of jurisdiction, subject to a few exceptions not affecting the particular case, that ‘the occupation of Catalonia by French troops and its government by French authorities had not communicated to its inhabitants the character of French citizens, nor to their territory the character of French territory, and that such character could only be acquired by a solemn act of incorporation which had not been gone through<sup>1</sup>.’ It is somewhat curious that a principle

<sup>1</sup> i Edwards, 182; Ortolan, *Dip. de la Mer*, liv. ii. ch. xiii. See also the

which has sufficiently seized upon the minds of jurists to be applied within the large scope of the foregoing cases should not have been promptly extended by international lawyers to cover the whole position of an occupied country relatively to an invader. The restricted admission of the principle is the more curious that the usages of modern war are perfectly consistent with its full application. The doctrine of substituted sovereignty, and with it the corollary that the inhabitants of occupied territory owe a duty of obedience to the conqueror, are no longer permitted to lead to their natural results. They confer no privileges upon an invader which he would not otherwise possess; and they only now serve to enable him to brand acts of resistance on the part of an invaded population with a stigma of criminality which is as useless as it is unjust. Until recently nevertheless many writers, and probably most belligerent governments, have continued to hold that in spite of the unchanged national character of the people and the territory, the fact of occupation temporarily invests the invading state with the rights of sovereignty, and dispossesses its enemy, so as to set up a duty of obedience to the former and of disregard to the commands of the latter. The reasoning or the assumptions upon which this doctrine rests may be stated as follows. The power to protect is the foundation of the duty of allegiance; when therefore a state ceases to be able to protect a portion of its subjects it loses its claim upon their allegiance; and they either directly 'pass under a temporary or qualified allegiance to the conqueror,' or, as it is also put, being able

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tion of it.

American case of the American Insurance Company *v.* Canter, 1 Peters, 542. During the Mexican War the Attorney-General of the United States took the same view with respect to crimes committed during the occupation of Mexico as that adopted by the French courts in the Catalan murder case. Halleck, ii. 451. The continuance of the sovereignty of the state over its occupied parts is affirmed, though in the subordinate shape of a kind of 'latent title,' by Klüber, § 256; Wheaton, Elem. pt. iv. ch. iv. § 4, and Manning, ch. 5, among the earlier writers of this century. De Martens (*Précis*, § 280) would seem by his silence to adhere to the ancient doctrine.

PART III. in their state of freedom to enter into a compact with the  
 CHAP. IV. invader, they tacitly agree to acknowledge his sovereignty  
 in consideration of the relinquishment by him of the extreme  
 rights of war which he holds over their lives and property<sup>1</sup>.  
 It is scarcely necessary to point out that neither of these  
 conclusions is justified by the premises. Supposing a state  
 to have lost its right to the allegiance of its subjects, the  
 bare fact of such loss cannot transfer the right to any other  
 particular state. The invaded territory and its inhabitants  
 merely lie open to the acceptance or the imposition of a new  
 sovereignty. To attribute this new sovereignty directly to  
 the occupying state is to revive the doctrine of a *res nullius*,  
 which is consistent only with a complete and permanent  
 transfer of title. On the other hand, while it may be granted  
 that incapacity on the part of a state to protect its subjects  
 so far sets them free to do the best they can for themselves  
 as to render valid any bargain actually made by them, the  
 assertion that any such bargain as that stated is implied in  
 the relations which exist between the invader and the invaded  
 population remains wholly destitute of proof. Any contract  
 which may be implied in these relations can only be gathered  
 from the facts of history, and though it is certain that in-  
 vaders have habitually exercised the privileges of sovereignty,  
 it is equally certain that invaded populations have generally  
 repudiated the obligation of obedience whenever they have  
 found themselves possessed of the strength to do so with  
 effect. The only understanding which can fairly be said to  
 be recognised on both sides amounts to an engagement on

<sup>1</sup> Klüber, § 256 ; De Martens, Précis, § 280 ; Mr. Justice Story in *Shanks v. Dupont*, Peters, iii. 246 ; Halleck, ii. 462-4 ; Twiss, ii. § 64.

A recent instance of the assertion of substituted sovereignty by a belligerent government is supplied by the proclamation which Count Bismarck Bohlen, Governor-General of Alsace, issued on entering on his office in August, 1870. It begins as follows : ' Les événements de la guerre ayant amené l'occupation d'une partie du territoire français par les forces allemandes, ces territoires se trouvent par ce fait même soustraits à la souveraineté impériale, en lieu et en place de laquelle est établie l'autorité des puissances allemandes.' D'Angeberg, No. 371.

the part of an invader to treat the inhabitants of occupied territory in a milder manner than is in strictness authorised by law, on the condition that, and so long as, they obey the commands which he imposes under the guidance of custom. PART III:  
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In the face of so artificial and inconsistent a theory as that which has just been described it is not surprising that a tendency should have become manifest of late years to place the law of occupation upon a more natural basis. Recent writers adopt the view that the acts which are permitted to a belligerent in occupied territory are merely incidents of hostilities, that the authority which he exercises is a form of the stress which he puts upon his enemy, that the rights of the sovereign remain intact, and that the legal relations of the population towards the invader are unchanged. If the same doctrine has not yet been expressly accepted by most of the great military powers, it is probably not premature to say that the smaller states are unanimous in its support, and the former at the Conference of Brussels at least consented to frame the proposed Declaration in language which implies it<sup>1</sup>. Recent  
doctrine.

Looking at the history of opinion with reference to the legal character of occupation, at the fact that the fundamental principle of the continuing national character of an occupied territory and its population is fully established, at the amount of support which is already given to the doctrines which are necessary to complete its application in detail, and to the uselessness of the illogical and oppressive fiction of substituted Conclu-  
sions.

<sup>1</sup> Calvo, § 873 ; Rolin Jacquemyns, *La Guerre Actuelle dans ses Rapports avec le Droit International*, p. 29 ; Heffter, § 131. Bluntschli, § 539-40 and 545, fully recognises the purely military character of the invader's authority, but seems somewhat to confuse the extreme inadvisability under ordinary circumstances of resisting it with the absence of right to resist. See also *Instructions for American Armies in the Field*, arts. 1 and 3. The text of the Project of Declaration of Brussels requires to be read in connection with the discussions which took place at the Conference. The French *Manuel de Droit Int. à l'Usage des Officiers de l'Armée de Terre* says (p. 93), 'l'occupation est simplement un état de fait, qui produit les conséquences d'un cas de force majeure ; l'occupant n'est pas substitué en droit au gouvernement legal.'

PART III. sovereignty, the older theories may be unhesitatingly ranked  
 CHAP. IV. as effete, and the rights of occupation may be placed upon the  
 broad foundation of simple military necessity.

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their  
 limits.

§ 155. If occupation is merely a phase in military operations, and implies no change in the legal position of the invader with respect to the occupied territory and its inhabitants, the rights which he possesses over them are those which in the special circumstances represent his general right to do whatever acts are necessary for the prosecution of his war<sup>1</sup>; in other words he has the right of exercising such control, and such control only, within the occupied territory as is required for his safety and the success of his operations. But the measure and range of military necessity in particular cases can only be determined by the circumstances of those cases. It is consequently impossible formally to exclude any of the subjects of legislative or administrative action from the sphere of the control which is exercised in virtue of it; and the rights acquired by an invader in effect amount to the momentary possession of all ultimate legislative and executive power. On occupying a country an invader at once invests himself with absolute authority; and the fact of occupation draws with it as of course the substitution of his will for previously existing law whenever such substitution is reasonably needed, and also the replacement of the actual civil and judicial administration by military jurisdiction. In its exercise however this ultimate authority is governed by the condition that the invader, having only a right to such control as is necessary for his safety and the success of his operations, must use his power within the limits defined by the fundamental notion of occupation, and with due reference to its transient character. He is therefore forbidden as a general rule to vary or suspend laws affecting

<sup>1</sup> The right of appropriating all property of the enemy state which is separable from the occupied territory, e.g. the produce of taxes, is usually classed with rights of occupation (Bluntschli, § 545); it clearly flows however, not from any right of occupation, but from the general right of appropriation.

property and private personal relations, or which regulate the moral order of the community. Commonly also he has not the right to interfere with the public exercise of religion, or to restrict expression of opinion upon matters not directly touching his rule, or tending to embarrass him in his negotiations for peace<sup>1</sup>.

§ 156. The invader deals freely with the relations of the inhabitants of the occupied territory towards himself. He suspends the operation of the laws under which they owe obedience to their legitimate ruler, because obedience to the latter is not consistent with his own safety; for his security also, he declares certain acts, not forbidden by the ordinary laws of the country, to be punishable; and he so far suspends the laws which guard personal liberty as is required for the summary punishment of any one doing such acts. All acts of disobedience or hostility are regarded as punishable; and by specific rules the penalty of death is incurred by

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in matters  
bearing on  
the secu-  
rity of the  
occupant.

<sup>1</sup> Bluntschli, § 539-40; and comp. American Instruct., arts. 1-3. The manner in which the will of the invader acts under ordinary circumstances is thus described by the Duke of Wellington: 'Martial law is neither more nor less than the will of the general who commands the army. In fact martial law means no law at all; therefore the general who declares martial law, and commands that it shall be carried into execution, is bound to lay down distinctly the rules and regulations and limits according to which his will is to be carried out. Now I have in another country carried out martial law; that is to say, I have governed a large proportion of a country by my own will. But then what did I do? I declared that the country should be governed according to its own national law; and I carried into execution that my so declared will.' Quoted by Creasy, First Platform of International Law, p. 507. Compare the Project of Declaration of Brussels, art. 3, and the decision of the delegated Commission of the Conference, made at the sitting of Aug. 22, that art. 3 shall be understood to mean that political and administrative laws shall be subject to suspension, modification, or replacement in case of necessity, but that civil and penal laws shall not be touched. Parl. Papers, Miscell. i. 1875, p. 120. On assuming the government of Alsace in 1870, Count Bismarck Bohlen declared that 'le maintien des lois existantes, le rétablissement d'un ordre de choses régulier, la remise en activité de toutes les branches de l'administration, voilà où tendront les efforts de mon gouvernement dans la limite des nécessités imposées par les opérations militaires. La religion des habitants, les institutions, et les usages du pays, la vie et la propriété des habitants jouiront d'une entière protection.' Proclam. of Aug. 30, D'Angeberg, No. 371.

PART III. persons giving information to the enemy, or serving as guides  
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to the troops of their own country, by those who while serving as guides to the troops of the invader intentionally mislead them, and by those who destroy telegraphs, roads, canals, or bridges, or who set fire to stores or soldiers' quarters<sup>1</sup>. If the inhabitants of the occupied territory rise in insurrection, whether in small bodies or *en masse*, they cannot claim combatant privileges until they have displaced the occupation, and all persons found with arms in their hands can in strict law be killed, or if captured be executed by sentence of court martial<sup>2</sup>. Sometimes the inhabitants of towns or districts in which acts of the foregoing nature have been done, or where they are supposed to have originated, are rendered collectively responsible, and are punished by fines or by their houses being burned. In 1871 the German governor of Lorraine ordered, 'in consequence of the destruction of the bridge of Fontenoy, to the east of Toul, that the district included in the Governor-Generalship of Lorraine shall pay an extraordinary contribution of 10,000,000 francs by way of fine,' and announced that 'the village of Fontenoy has been immediately burned.' In October 1870 the general commanding in chief the second German Army issued a proclamation declaring that all houses or villages affording shelter to *Francs Tireurs* would be burned, unless the Mayor of the Commune informed the nearest Prussian officer of their presence immediately on their arrival in the Commune; all Communes in which injury was suffered by railways, telegraphs, bridges or canals, were to pay a special contribution, notwithstanding that such injury might have been done by others than the inhabitants, and even without their knowledge. A general order affecting all territory occupied or to be occupied had been already issued

<sup>1</sup> Bluntschli, § 631, 636, 641. Rolin Jacquemyns (Second Essai sur la Guerre Franco-Allemande, p. 30) remarks that while the right of inflicting death for such acts must be maintained, its actual infliction ought only to take place in exceptional cases.

<sup>2</sup> American Inst. 85; Bluntschli, § 643.



in August, under which the Communes to which any persons doing a punishable act belonged, as well as those in which the act was carried out, were to be fined for each offence in a sum equal to the yearly amount of their land-tax<sup>1</sup>.

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<sup>1</sup> D'Angeberg, Nos. 328, 854, and 1015. The following extract from the General Orders issued to the Prussian army in August, 1870, gives a connected view of the acts punished by the Germans and of the penalties which they affixed to their commission :—

' 1°. La juridiction militaire est établie par la présente. Elle sera appliquée dans toute l'étendue du territoire Français occupé par les troupes allemandes à toute action tendant à compromettre la sécurité de ces troupes, à leur causer des dommages ou à prêter assistance à l'ennemi. La juridiction militaire sera réputée en vigueur et proclamée pour toute l'étendue d'un canton, aussitôt qu'elle sera affichée dans une des localités qui en font partie.

' 2°. Toutes les personnes qui ne font pas partie de l'armée française et n'établiront pas leur qualité de soldat par des signes extérieurs et qui :

' (a) Serviront l'ennemi en qualité d'espions ;

' (b) Egayeront les troupes allemandes quand elles seront chargées de leur servir de guides ;

' (c) Tueront, blesseront ou pilleront des personnes appartenant aux troupes allemandes ou faisant partie de leur suite ;

' (d) Detruiront des ponts ou des canaux, endommageront les lignes télégraphiques ou les chemins de fer, rendront les routes impraticables, incendieront des munitions, des provisions de guerre, ou les quartiers de troupes ;

' (e) Prendront les armes contre les troupes allemandes.

' Seront punis de la peine de mort.

' Dans chaque cas, l'officier ordonnant la procédure instituera un conseil de guerre chargé d'instruire l'affaire et de prononcer le jugement. Les conseils de guerre ne pourront condamner à une autre peine qu'à la peine de mort. Leurs jugements seront exécutés immédiatement.

' 3°. Les communes auxquelles les coupables appartiendront, ainsi que celles dont le territoire aura servi à l'action incriminée, seront passibles, dans chaque cas, d'une amende égale au montant annuel de leur impôt foncier.' D'Angeberg, No. 328.

A proclamation, issued on the occasion of the insurrection in Lombardy in 1796, shows the manner in which Napoleon dealt with risings in occupied countries :—

' L'armée française, aussi généreuse que forte, traitera avec fraternité les habitants paisibles et tranquilles ; elle sera terrible comme le feu du ciel pour les rebelles et les villages qui les protégeraient. Art. 1. En conséquence le general en chef déclare rebelles tous les villages qui ne se sont pas conformés à son ordre du 6 prairial, (which was, Ceux qui, sous 24 heures, n'auront pas posé les armes et n'auront pas prêté de nouveau serment d'obéissance à la République, seront traités comme rebelles ; leurs villages seront brûlés). Les généraux feront marcher contre les villages les forces nécessaires pour les réprimer, y mettre le feu, et faire fusiller tous ceux qu'ils trouveront les armes à la main.



**PART III.** It has been confessed that it is impossible to set bounds  
**CHAP. IV.** to the demands of military necessity; there may be occasions  
 on which a violent repressive system, like that from which the foregoing examples have been drawn, may be needed and even in the end humane; there may be occasions in which the urgency of peril might excuse excesses such as those committed by Napoleon in Italy and Spain. But it is impossible also not to recognise that in very many cases, probably indeed in the larger number, the severity of the measures adopted by an occupying army is entirely disproportioned to the danger or the inconvenience of the acts which it is intended to prevent; and that when others than the perpetrators are punished, the outrage which is done to every feeling of justice and humanity can only be forgiven where military necessity is not a mere phrase of convenience, but an imperative reality.

Hostages are sometimes seized by way of precaution in order to guarantee the maintenance of order in occupied territory. The usage which forbids that the life of any hostage shall be taken, for whatever purpose he has been seized or accepted, and which requires that he shall be treated as a prisoner of war<sup>1</sup>, renders the measure unobjectionable;

'Tous les prêtres, tous les nobles qui seront restés dans les communes rebelles seront arrêtés comme otages et envoyés en France. Art. 2. Tous les villages où l'on sonnera le tocsin seront sur le champ brûlés. Les généraux sont responsables de l'exécution du dit ordre. Art. 3. Les villages sur le territoire desquels serait commis l'assassinat d'un Français seront taxés à une amende du tiers de la contribution qu'ils payaient à l'archiduc dans une année, à moins qu'ils ne déclarent l'assassin et qu'ils ne l'arrêtent, et le remettent entre les mains de l'armée. Art. 4. Tout homme trouvé avec un fusil et des munitions de guerre sera fusillé de suite, par ordre du general commandant l'arrondissement. Art. 5. Toute campagne ou il sera trouvé des armes cachées sera condamnée à payer le tiers du revenu qu'elle rend, en forme d'amende. Toute maison où il sera trouvé un fusil sera brûlée, à moins que le propriétaire ne déclare à qui il appartient. Art. 6. Tous les nobles ou riches qui seraient convaincus d'avoir excité le peuple à la révolte, soit en congédiant leurs domestiques, soit par des propos contre les Français, seront arrêtés comme otages, transférés en France, et la moitié de leurs revenus confisquée.' Corresp. de Nap. i. i. 323, 327.

<sup>1</sup> See § 136.

but in proportion as it is unobjectionable it fails to be deterrent. The temporary absence of a deposit which must be returned in the state in which it was received can only prevent action where it is a necessary means to action; and the detention of hostages when they are treated in a legal manner can only be of use if it totally deprives a population of its natural leaders<sup>1</sup>. Hence the seizure of hostages is less often used as a guarantee against insurrection than as a momentary expedient or as a protection against special dangers, which it is supposed cannot otherwise be met. In such cases a belligerent is sometimes drawn by the convenience of intimidation into acts which are clearly in excess of his rights. In 1870 the Germans ordered that 'railways having been frequently damaged, the trains shall be accompanied by well-known and respected persons inhabiting the towns or other localities in the neighbourhood of the lines. These persons shall be placed upon the engine, so that it may be understood that in every accident caused by the hostility of the inhabitants, their compatriots will be the first to suffer. The competent civil and military authorities together with the railway companies and the *etappen* commandants will organise a service of hostages to accompany the trains.' The order was universally and justly reprobated on the ground that it violated the principle which denies to a belligerent any further power than that of keeping his hostage in confinement; and it is for governments to consider whether it is worth while to retain a right which can only be made effective by means of an illegal brutality which existing opinion refuses to condone<sup>2</sup>.

<sup>1</sup> Napoleon endeavoured to do this in Italy in 1796. See Art. of Proclamation quoted p. 403.

<sup>2</sup> Order of the Civil Governor of Rheims. D'Angeberg No. 686; Rolin Jacquemyns, *La Guerre Actuelle*, p. 32; Calvo, ii. 152. Bluntschli (§ 600) says that the measure was 'peu recommandable.'

At St. Quentin and other places the Germans innocently but uselessly required hostages as a guarantee against the commission of irregular hostilities between the surrender of the town and the completion of its occupation. It is not easy to suppose that any hot-headed person who might be inclined to break

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administra-  
tive mat-  
ters, &c.

§ 157. It has been seen that the authority of the local civil and judicial administration is suspended as of course so soon as occupation takes place. It is not usual however for an invader to take the whole administration into his own hands. Partly because it is more easy to preserve order through the agency of the native functionaries, partly because they are more competent to deal with the laws which remain in force, he generally keeps in their posts such of the judicial and of the inferior administrative officers as are willing to serve under him, subjecting them only to supervision on the part of the military authorities, or of superior civil authorities appointed by him<sup>1</sup>. He may require persons so serving him to take an oath engaging themselves during the continuance of the occupation to obey his orders, and not to do anything to his prejudice<sup>2</sup>; but he cannot demand that they shall exercise their functions in his name<sup>3</sup>. The former require-

into acts of violence at such a moment would be deterred by the prospect that two municipal counsellors would be prisoners in Germany until the end of the war.

<sup>1</sup> In 1806 Napoleon, on occupying the greater part of Prussia, retained the existing administration under the general direction of a French official. Lanfrey, *Hist. de Nap.* i. iv. 25. The Duke of Wellington, on invading France, directed the local authorities to continue the exercise of their functions, apparently without appointing any English superior. Wellington Despatches, xi. 307. The Germans, on the other hand, in 1870 appointed officials, at least in Alsace and Lorraine, in every department of the administration and of every rank. Calvo, § 882. See also the French *Manuel à l'Usage*, &c. p. 98.

<sup>2</sup> Am. Inst. art. 26; Bluntschli, § 551. The following was the oath taken in 1806 by the Prussian officials who continued to exercise their functions during the French occupation: 'I swear to exercise with fidelity the authority which is committed to me by the Emperor of the French, and to act only for the maintenance of the public tranquillity, and to concur with all my power in the execution of all the measures which may be ordered for the service of the French army, and to hold no correspondence with its enemies.' Alison, *Hist. of Europe*, v. 855.

<sup>3</sup> Calvo, § 879. In 1870 this rule was infringed by the German authorities in France, who after the fall of the Emperor Napoleon ordered the Courts at Nancy to administer justice in the name of the 'High German Powers occupying Alsace, Lorraine, &c.,' alleging that the formula 'in the name of the French people and government,' which was actually in use, implied a recognition of the republic. The situation was no doubt embarrassing, as Prussia was at that time unwilling to negotiate with any but the Imperial government;

ment is merely a precaution which it is reasonable for him to take in the interests of his own safety; the latter would imply a claim to the possession of rights of sovereignty, and would therefore not be justified by the position which he legally holds within the occupied territory.

§ 158. Under the general right of control which is granted to an invader for the purposes of his war he has obviously the right of preventing his enemy from using the resources of the occupied territory. He therefore intercepts the produce of the taxes and other assistance in money, he closes commercial access so as to blockade that portion of the territory which is conterminous with the occupied part, and forbids the inhabitants of the latter, under such penalties as may be necessary, from joining the armies of their country<sup>1</sup>.

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Use of the  
resources  
of the  
country.

but there can be equally little doubt that the manner in which the difficulty was met was eminently improper. Few will probably be found to dispute the common sense of the remark of M. Bluntschli, who says (§ 547) that '*la solution la plus naturelle aurait été ou bien une formule neutre, par exemple; "au nom de la loi," ou la suppression de la formule elle même, dont l'utilité est fort contestable.*' The courts refused to obey, and suspended their sittings. For documents connected with the occurrence, see Calvo, § 882. The French Manuel à l'Usage des Officiers de l'Armée de Terre (p. 100) prescribes that magistrates shall be allowed to administer justice in the name of the legitimate sovereign.

<sup>1</sup> During the Franco-German War, if persons subject to conscription according to French law, and inhabiting occupied territory not comprised within the governor generalship of Alsace-Lorraine, left their place of residence clandestinely, or without sufficient motive, their relatives were fined 50 francs for each day of absence (Ordonnance of 27th Oct., 1870, D'Angeberg, No. 684). Within Alsace-Lorraine a decree ordered (art. 1) that '*celui qui se joint aux forces militaires françaises est puni par la confiscation de sa fortune présente et future et par un bannissement de dix ans.* (Art 5.) *Celui qui veut s'éloigner du siège de son domicile, doit en demander, après justification préalable de motif, l'autorisation par écrit au préfet. De celui qui s'est éloigné, sans cette autorisation, plus longtemps que huit jours de son domicile, on suppose en droit qu'il est allé rejoindre les forces françaises. Cette supposition suffit pour la condamnation.*' (D'Angeberg, No. 875.) Commenting upon the latter order M. Bluntschli says (§ 540) that '*au sujet des peines de la confiscation et du bannissement prononcées contre les contrevenants des doutes graves peuvent être soulevés, d'une part, parceque ces peines paraissent d'une rigueur excessive, et ensuite parceque leurs effets ont une durée plus considérable que les intérêts militaires ne l'exigent.*' M. Rolin Jacquemyns thinks (Second Essai, p. 34) '*qu'il n'est pas*

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Under the same general right he may apply the resources of the country to his own objects. He may compel the inhabitants to supply him with food, he may demand the use of their horses, carts, boats, rolling stock on railways, and other means of transport, he may oblige them to give their personal services in matters which do not involve military action against their sovereign. But the right to take a thing does not necessarily involve the right to take it without payment, and the right of an invader is a bare one; so long therefore as he confines himself within the limits defined by his right of control he can merely compel the render of things or services on payment in cash or by

*contraire au droit d'exiger des habitants que pour s'absenter, ils se munissent d'un permis spécial, et de considerer comme suspects ceux qui, étant en âge de porter les armes, voyagent sans ce permis.' . . But, ' nous ne pouvons que trouver exorbitants les moyens indiqués par le décret. La peine odieuse par elle même de la confiscation générale de tous biens présents et futurs, devient plus odieuse encore lorsqu'elle s'applique à un acte qui dans l'opinion de ses auteurs a dû passer non seulement pour légitime, mais pour obligatoire. . . . On peut comparer l'individu qui a réussi à s'échapper sans permis à un vaisseau . . qui violerait un blocus. Une fois l'obstacle franchi, c'est à l'état dont la vigilance a été en défaut à en subir les conséquences. . . . Tout ce que l'on pourrait admettre c'est que, jusqu'au retour de la personne absente sans permis, l'état envahissant mit ses biens sous séquestre provisoire.'* It may be answered to the above criticisms that the rights of punishment possessed by an invader being entirely independent of the legitimacy of the action for which its punishment is inflicted, it is immaterial whether the individual is acting rightly or wrongly; the sole point to consider is whether a certain amount of rigour is necessary to attain an end, and whether that end is important enough to justify rigour. It is clear that emigration to join a national army is in itself as hostile an act as others which a belligerent is authorised to repress with severity, and that if carried on largely over a considerable area it would be highly dangerous to him. It is hard therefore to say that if milder means are first tried, any ultimate harshness is too great. In the particular case the Alsace-Lorraine decree was not issued till December; it strikes no one but the emigrant himself; and 12,000 men had already escaped to join the French army (Circular of Count Chaudordy, D'Angeberg, No. 1024); under all the circumstances therefore it possibly was not too severe. The earlier decree affecting the other occupied provinces is far more open to criticism. Vicarious punishment never commends itself by its justice, and recourse should only be had to it in the last extremity. M. Bluntachli's objection that the effects of a punishment ought not to have a greater duration than the state of military affairs which renders it necessary is sound. The termination of war ought to put an end to all punishments which are still in progress.

an acknowledgment of indebtedness which he is himself bound to honour. If he either makes no such payment or gives receipts, the value represented by which he leaves to the sovereign of the occupied territory to pay at the end of the war, he oversteps these limits, and seizes private property under his general right of appropriation<sup>1</sup>.

§ 159. It has been already mentioned that belligerents have commonly assumed, and that some writers still maintain, that it is the duty of the inhabitants of an occupied country to obey the occupying sovereign, and that the fact of occupation deprives the legitimate sovereign of his authority. It has been shown however, upon the assumption that the rights of an occupant are founded only on military necessity, that this view of the relation between the invader and the invaded population, and between the latter and their government, is unsound. The invader succeeds in a military operation, in order to reap the fruits of which he exercises control within the area affected; but the right to do this can no more imply a correlative duty of obedience than the right to attack and destroy an enemy obliges the latter to acquiesce in his own destruction. The legal and moral relation therefore of an enemy to the government and people of an occupied territory are not changed by the fact of occupation. He has gained certain rights; but side by side with these the rights of the legitimate sovereign remain intact. The latter may forbid his officials to serve the invader, he may order his subjects to refuse obedience, or he may excite insurrections<sup>2</sup>. So also the

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Legal relation of an enemy to the government and people of an occupied territory.

<sup>1</sup> See § 139. The distinction must be kept in mind, belligerent governments and some writers being anxious to represent seizure without payment for military purposes as an act of sovereignty and not of military violence.

<sup>2</sup> Bluntschli (§ 541) justly says that when the government of an invaded territory withdraws its functionaries, and even its police, as was done by Austria in 1866, the enemy suffers much less than the inhabitants. The ordinary life of the country is paralysed, but the invader will find the means of doing whatever is necessary for his own convenience. If however the doctrine stated in the text is well founded, M. Bluntschli is wrong in declaring (§ 540) that the French government overstepped the limits of its rights in December 1870, when it forbade the people in Lorraine under pain of death to

**PART III.** inhabitants of the occupied territory preserve full liberty of  
**CHAP. IV.** action. Apart from an express order from their own govern-  
 ——— ment they are not called upon to resist the invader, or to  
 neglect such commands as do not imply a renunciation of their  
 allegiance; but on the other hand they may rise against  
 him at any moment, on the full understanding that they do  
 so at their own peril.

Duties of  
 an occu-  
 pant.

§ 160. Though the fact of occupation imposes no duties upon the inhabitants of the occupied territory the invader himself is not left equally free. As it is a consequence of his acts that the regular government of the country is suspended, he is bound to take whatever means are required for the security of public order<sup>1</sup>; and as his presence, so long as it is based upon occupation, is confessedly temporary, and his rights of control spring only from the necessity of the case, he is also bound, over and above the limitations before stated<sup>2</sup>, to alter or override the existing laws as little as possible, whether he is acting in his own or the general interest. As moreover his rights belong to him only that he may bring his war to a successful issue, it is his duty not to do acts which injure individuals, without facilitating his operations, or putting a stress upon his antagonist. Thus though he may make use of or destroy both public and private property for any object connected with the war, he must not commit wanton damage, and he is even bound to protect public buildings, works of art, libraries, and museums.

work for the German forest administration. It was only guilty of forcing them to choose between the alternative of immediate punishment by the Germans, and of possible future punishment, with the brand of unpatriotism added, from the courts of their own nation. Such acts are generally unwise and even cruel, but they are none the less clearly within the rights of a government.

<sup>1</sup> The costs of administration are defrayed out of the produce of the regular taxes, customs, &c. of the country, which the invader is authorized to levy for this purpose. These costs must be satisfied before he exercises his right to appropriate the taxes, &c. to his own profit. Comp. Inst. for Amer. Armies, art. 39; Project of Declaration of Brussels, art. 5; Bluntschli, § 647.

<sup>2</sup> These duties are clearly stated in arts. 2 and 3 of the Project of Declaration of Brussels.



§ 161. The consequences of occupation being so serious as PART III. they in fact are to the inhabitants of an occupied territory, CHAP. IV. it becomes important to determine as accurately as possible When oc- at what moment it begins and ends in a given spot. Up cupation begins and to a certain point there can be no doubt. Within the outposts ceases. of an army and along its lines of communication, so long as they are kept open, the exclusive power of the invader is an obvious fact. But in the territory along the flank and in advance of the area thus defined it is an unsettled question under what conditions occupation can exist. According to one view it is complete throughout the whole of a district forming an administrative unit so soon as notice of occupation has been given by placard or otherwise at any spot within it, unless military resistance on the part of duly organised national troops still continues<sup>1</sup>; when occupation is once established it does not cease by the absence of the invading force, so that flying columns on simply passing through a place can render the inhabitants liable to penalties for disobedience to orders issued subsequently when no means of enforcing them exists, or for resistance offered at any later time to bodies of men in themselves insufficient to subdue such resistance; although also occupation comes to an end if the invader is expelled by the regular army of the country, it is not extinguished by a temporary dispossession, effected by a popular movement, even if the national government has been reinstated. This doctrine may be gathered from the recent German practice, and from that of Napoleon in the early years of this century; it is therefore that which has been acted upon in most modern wars in which occupation has taken place upon a large scale<sup>2</sup>. No distinct usage of

<sup>1</sup> The administrative unit adopted by the Germans in 1870 as that, the whole of which was affected by notice of occupation given at any spot within it, was the canton. The average size of a French canton is about 72 square miles.

<sup>2</sup> M. Bluntschli's language (§ 544) expresses the above view, except that he would seem to exclude occupation by flying columns: 'La prise de possession du territoire ne cesse pas par le simple fait du départ des troupes d'occupation.'



**PART III.** a more moderate kind can, on the other hand, be said to  
**CHAP. IV.** have formed itself; though there are indications of the growth of an opinion hostile to the current practices. The discussions which took place at the Conference of Brussels resulted in the introduction of a new article into the Project of Declaration for the purpose of defining the conditions under which territory should be considered to be occupied. By this, occupation was said to 'extend only to territories where the authority of the enemy's army is established and is capable of being exercised,' and it is evident from the Protocols that capacity to exercise authority was understood to depend upon the existence of an immediately available force<sup>1</sup>. The language of the article is wanting in precision,

Lorsqu'une armée pénètre sur le territoire ennemi, elle conserve la possession de la partie du territoire situé derrière elle, même lorsqu'elle n'y a pas laissé de soldats, et cela tant qu'elle ne renonce pas intentionnellement à sa possession ou qu'elle n'est pas dépossédée par l'ennemi.' See Gen. Von Voigts Rhetz on flying columns and temporarily successful insurrections, *Parl. Papers, Miscell.* i. 1875, p. 65; art. 1 of the German Arrêté of 1870, quoted above, p. 403. A good example of the manner in which the Germans maintained occupation during the French War without the support of present or neighbouring force is afforded by their occupation of the country lying between Paris, Amiens, and the sea. 'I once travelled,' says Mr. Sutherland Edwards, 'from St. Germain to Louviers, a distance of fifty miles, along a road occupied theoretically by the Prussians without seeing a Prussian soldier. From the outskirts of Rouen to Dieppe, nearly fifty miles, I met here and there, and at one place found a post of perhaps half-a-dozen men. At Dieppe, Prussian proclamations on the walls and the local cannons spiked or otherwise spoiled; the police and firemen disarmed; the telegraph in every direction cut, the postal service stopped; but nowhere a Prussian or a German soldier. From Dieppe to Neufchâtel, not a soldier, with the exception of a few invalids kept in Neufchâtel in hospital; from Neufchâtel to the advanced posts of the army at Amiens, again not a soldier. Yet from St. Germain, by way of Louviers and Elbœuf to Rouen, from Rouen to Dieppe, from Dieppe to Amiens, the roads and adjacent districts were all under Prussian rule.' (*The Germans in France.*) The practice of Napoleon with respect to flying columns may be indicated by an order issued in 1806 to Marshal Lannes when the French army had not yet passed the Oder: 'Mon intention est que vous réunissiez toute votre cavalerie légère au delà de l'Oder, et qu'elle batte tout le pays jusqu'à la Vistule. Vous donnerez pour instructions aux commandants de défendre aux recrues d'aller rejoindre, conformément à l'appel que leur fait en ce moment le roi de Prusse, et de faire connaître partout que le premier village qui laissera partir ses recrues sera puni.' *Corresp.* xiii. 467.

<sup>1</sup> The delegates of Sweden and Switzerland directed attention to the close

and if it were received without amendment as the standard of law, Lord Derby would be justified in entertaining the fear which he has expressed, that 'the inhabitants of an invaded territory would find in such colourless phrases very inadequate protection from the liberal interpretation of the necessities and possibilities of warfare by a victorious enemy<sup>1</sup>.' Defective however as it is, and notwithstanding that it represents little more than an endeavour to find out a common ground upon which conflicting opinions might momentarily unite, distinct gain would have accrued from the acceptance of any definition, however imperfect, which is more in harmony with the true basis of the law of occupation than that to which great military states have hitherto been in the habit of giving effect. The principle that occupation, in order to confer rights, must be effective, when once stated, is too plainly in accordance with common sense, and too strictly follows the law already established in the analogous case of blockade, to remain unfruitful, and there can be little doubt that practice will in time be modified so as to conform within reasonable bounds to the deductions which may logically be drawn from it.

That the more violent usage is theoretically indefensible scarcely requires proof. Rights which are founded upon mere force reach their natural limit at the point where force ceases to be efficient. They disappear with it; they reappear with it; and in the interval they are non-existent. If moreover neither the legitimate sovereign of a territory nor an invader holds a territory as against the other by the actual presence of force, so that in this respect they are equal, the

analogy which exists between occupation and a blockade (Parl. Papers, Miscell. i. 1875, p. 64). The right of blockade which, like occupation, is based solely upon the military necessities of a belligerent, gives him certain rights within limits of place which are defined by his immediately effective force. See part iv, chap. vi. The principle of the article was approved of by a considerable number of jurists at a meeting of the Institute of International Law in 1875. See also Rolin Jacquemyns, *Second Essai*, p. 34.

<sup>1</sup> Parl. Papers, Miscell., No. ii. 1875, p. 5.

PART III. presumption must be that the authority of the legitimate  
CHAP. IV. owner continues to the exclusion of such rights as the invader  
acquires by force. As a matter of fact, except in a few cases which stand aside from the common instances of extension of the rights of occupation over a district, of which part only has been touched by the occupying troops, the enforcement of those rights through a time when no troops are within such distance as to exercise actual control, and still more the employment of inadequate forces, constitute a system of terrorism, grounded upon no principle, and only capable of being maintained because an occupying army does not scruple to threaten and to inflict penalties which no government can impose upon its own subjects.

If it were settled that occupation should be considered to exist only together with the power of immediate enforcement of the rights attendant on it, occupation by flying columns, and occupation evidenced by the presence of a plainly inadequate force, would disappear; and with them would disappear the abuses which are now patent. To insist without reservation upon the requirement of present force would not however be altogether just to the invader. It must be admitted that the country which is covered by the front of an army, although much of it may not be strongly held, and though it may in part be occupied only by the presence of a few officials, is as a rule far more effectually under command than territory beyond those limits, even when held by considerable detachments. This is so much the case that in such districts a presumption in favour of efficient control may be said to exist which the occurrence of a raid by national troops, the momentary success of an insurrection, or the presence of guerilla bands, is not enough to destroy. An invader may therefore fairly demand to be allowed to retain his rights of punishment, within the district indicated, until the enemy can offer proofs of success, solid enough to justify his assertion that the occupier is dispossessed. This requirement might probably be satisfied, and at the same time

sufficient freedom of action might be secured to the invaded nation by considering that a territory is occupied so soon as local resistance to the actual presence of an enemy has ceased, and continues to be occupied so long as the enemy's army is on the spot; or so long as it covers it, unless the operations of the national or an allied army or local insurrection have re-established the public exercise of the legitimate sovereign authority.

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## CHAPTER V.

### POSTLIMINIUM.

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In what  
postlimi-  
nium con-  
sists.

§ 162. WHEN territory which has been occupied and population which has been controlled by an enemy comes again into the power of its own state during the progress of a war, or when a state the whole of which has been temporarily subjugated throws off the yoke which has been placed upon it before a settled conquest has been clearly effected, or finally when a state or portion of a state is freed from foreign domination by the action of an ally before a conquest of it has been consolidated, the legal state of things existing prior to the hostile occupation is re-established. In like manner, when property of any of the kinds which have been mentioned as being susceptible of appropriation during the course of hostilities is captured by an enemy, and is then recaptured by the state to which it belongs or of which the person to whom it belongs is a subject, or by an ally, before the moment at which it so becomes the property of its captor that third parties can receive a transfer of it, the owner is replaced in legal possession of it. In all these cases the legal state of things existing before the hostile occupation or capture is conceived of for many purposes as having been in continuous existence<sup>1</sup>.

<sup>1</sup> Grotius, *De Jure Belli et Pacis*, lib. iii. c. ix; Vattel, liv. iii. ch. xiv; De Martens, *Précis*, § 283; Phillimore, iii. § ccciii-vi; Bluntschli, § 727-8, 736. Grotius, followed by Vattel and some more modern writers, supposes postliminium not to extend to moveables.

The above rule is based upon what is called, by an unnecessarily imposing name, the right of postliminium, from a somewhat distant analogy to the *jus postliminii* of the Roman law. Properly it is difficult to see that the so-called right has any ground for claiming existence as such. Hostile occupation of territory being merely the detention of property belonging to another, the control exercised over its inhabitants being the mere offspring of military necessity, and appropriation by conquest, in those cases in which the intention to conquer is present, being incomplete during the continuance of war, the rights of the original state person, where the life of the state is momentarily suspended, or of the legal owner, where a portion of its territory is cut off, remain untouched. The state is simply deprived temporarily of the means of giving effect to those rights; and when the cause of the deprivation is taken away, it is not a right, but the fact of power which revives. In the case therefore of territory recovered after hostile occupation the right of postliminium is merely a kind of substantive dress which is given to the negative fact that a legitimate owner is under no obligation to recognise as a source of rights the disorder which is brought into his household by an intruder; and though the case of property susceptible of appropriation during war is not identical, since the right of the enemy to deal with it as his own arises immediately that effectual seizure is made, it is rendered closely analogous by the fact that evidence of effectual seizure is only considered to be sufficient to bind the other belligerent, or to warrant recognition by neutrals, after the captured object has been taken into a safe place. In effect, the doctrine of postliminium amounts to the truistic statement that property and sovereignty cannot be regarded as appropriated until their appropriation has been completed in conformity with the rules of international law.

Putting aside certain of the effects of postliminium, which are mentioned by writers, but with which international law

PART III. is not concerned, such as its effect in reviving the constitution of the state, there seem to be only four subjects connected with it which need to be touched upon:—viz.

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1. Certain limitations to the operation of the right in the case of occupied territory.
2. The effect of acts done by an invader in excess of his rights.
3. The effect of the expulsion of an invader by a power not in alliance with the occupied state.
4. Special usages with regard to property recaptured at sea.

Limitations upon the operation of postliminium in the case of occupied territory.

§ 163. As a general rule the right of postliminium goes no further than to revive the exercise of rights from the moment at which it comes into operation. It does not, except in a very few cases, wipe out the effects of acts done by an invader, which for one reason or another it is within his competence to do. Thus judicial acts done under his control, when they are not of a political complexion, administrative acts so done, to the extent that they take effect during the continuance of his control, and the various acts done during the same time by private persons under the sanction of municipal law, remain good. Were it otherwise, the whole social life of a community would be paralysed by an invasion; and as between the state and individuals the evil would be scarcely less,—it would be hard for example that payments of taxes made under duress should be ignored, and it would be contrary to the general interest that sentences passed upon criminals should be annulled by the disappearance of the intrusive government. Political acts on the other hand fall through as of course, whether they introduce any positive change into the organisation of the country, or whether they only suspend the working of that already in existence. The execution also of punitive sentences ceases as of course when they have had reference to acts not criminal by the municipal law of the state; such for example as acts directed against the security or control of the

invader. Again, while acts done by an invader in pursuance of his rights of administrative control and of enjoyment of the resources of the state cannot be nullified in so far as they have produced their effects during his occupation, they become inoperative from the moment that the legitimate government is restored. Thus in 1870-1 certain persons entered into contracts with the German government for felling timber in state forests in France. They were paid in advance, and the stipulated fellings not having been finished at the time of the signature of the treaty of peace between the two countries, the contractors urged that as the German government was within its rights in causing the fellings to be made, the French government was bound to allow them to be completed. The French government held that the re-establishment of its own control had *ipso facto* nullified the contracts, and on the occasion of the signature of the supplementary convention of December 11, 1871, it made a declaration to that effect, which was accepted by the German government as correct in point of law. That French authority was re-established in the particular case by a treaty of peace is unimportant, the effects of re-establishment by treaty and in other ways being in such matters confessedly identical<sup>1</sup>.

§ 164. When an invader exceeds his legal powers, when for example he alienates the domains of the state or the landed property of the sovereign, his acts are null as against the legitimate government. Such acts are usually done by an invader who intends to effect a conquest, and supposes himself to have succeeded. Whether therefore they are valid or invalid in a given instance depends solely upon the strength of the evidence for and against his success.

§ 165. Some difference of opinion exists as to the effect of the expulsion of an invader by a power not in alliance with the occupied state. As the annexation of Genoa to Sardinia

Effects of acts done by an invader in excess of his rights.

Effect of expulsion of an invader by a power

<sup>1</sup> Heffter, § 188; Bluntschli, § 731; Calvo, § 1324.



PART III. in 1815 forms the leading case upon the subject, and is that  
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 Case of  
 Genoa in  
 1815.

to which all arguments have reference, it may be as well to begin by stating it. In the spring of 1814 Lord William Bentinck landed on the coast of Tuscany with a small Anglo-Sicilian force, and learning that the city of Genoa was inadequately garrisoned, determined to attempt its capture. The results of a couple of days' fighting induced the commandant to capitulate. The place was surrendered; the garrison retired under the terms of the capitulation to Nice; and the whole territory of the former republic fell into the hands of England, by conquest as between itself and France. The Genoese state had been destroyed in 1797, but the British government, in making the treaty of Amiens, had refused to acknowledge its destruction, and its formal union with France in 1805 had remained equally unrecognised. On the expulsion of the French a local republican government was set up with the sanction, and indeed at the suggestion, of Lord William Bentinck; but ultimately the city with its attendant territory was annexed to Sardinia, against the wishes of the inhabitants, in consequence of the general territorial redistribution which was made at the Congress of Vienna. Considerable feeling was excited in England by the latter occurrence, and resolutions condemnatory of it were moved in the House of Commons by Sir James Mackintosh. In the course of his speech in support of them he argued that 'in the year 1797, when Genoa was conquered by France, then at war with England, under pretence of being revolutionised, the Genoese republic was at peace with Great Britain; and consequently, in the language of the law of nations, they were friendly states. Neither the substantial conquest in 1797, nor the formal union of 1805, had ever been recognised by this kingdom. When the British commander therefore entered the Genoese territory in 1814, he entered the territory of a friend in the possession of an enemy. Can it be inferred that he conquered it from the Genoese people? We had rights of conquest against the French; but what

right of conquest would accrue from their expulsion as against the Genoese? How could we be at war with the Genoese?—not as with the ancient republic of Genoa, which fell when in a state of amity with us,—not as subjects of France, because we had never legally and formally acknowledged their subjection to that power. There could be no right of conquest against them, because there was neither the state of war, nor the right of war. Perhaps the powers of the continent, which had either expressly or tacitly recognised the annexation of Genoa in their treaties with France, might consistently treat the Genoese people as mere French subjects, and consequently the Genoese territory as a French province, conquered from the French government, which as regarded them had become the sovereign of Genoa. But England stood in no such position:—in her eye the republic of Genoa still of right subsisted. Genoa ought to have been regarded by England as a friendly state, oppressed for a time by the common enemy, and entitled to reassume the exercise of her sovereign rights as soon as that enemy was driven from her territory by a friendly force<sup>1</sup>.

The views of Sir James Mackintosh have very commonly been regarded as sound<sup>2</sup>, but they are not admitted by all writers. Heffter supposes, in agreement with the line of conduct pursued by England, that a state freed by the exertions of a power which is not its ally does not recover its existence as of course; and M. Bluntschli argues that though the liberating power cannot dispose of the country wholly without reference to the wishes of the population, yet that a state which is neither able to defend itself in the first instance nor to reestablish itself afterwards cannot be held to possess a clear and solid right to existence, and at the same time the liberating power has a right to be rewarded for its sacrifices,

<sup>1</sup> Hansard, xxx. 387 and 891, or Mackintosh's *Miscell. Works*, p. 703; Alison's *Hist. of Europe*, x. 209 and 295.

<sup>2</sup> Phillimore, iii. § cxxiii; Halleck, ii. 520-1; Calvo, § 1321. The same view had already been taken by Vattel, liv. iii. ch. xiv. § 213.

PART III. which indeed cannot be supposed to have been made in a  
 CHAP. V. spirit of pure disinterestedness ;—in settling the future of the  
 liberated country the interests and wishes both of it and of its  
 liberator ought, he thinks, to be taken into consideration<sup>1</sup>.

Conclu-  
 sions.

It may probably be safely concluded that the opinions of Sir James Mackintosh and his followers on the one hand and of MM. Heffter and Bluntschli on the other both contain elements of truth. As a matter of common sense, there can be no question that conquest cannot be held to be consolidated while a war continues which by any reasonable chance may extend to the conquered territory, and that a country which has been independent must be supposed to retain its existence in law as between itself and a foreign state so long as the latter has not recognised that conquest has taken place. The foreign state cannot at the same moment deny proprietary rights to the intruder, and arrogate rights to itself which can only be derived from the enemy character of the country which has been temporarily or permanently subjugated. Nor does the fact that it has made sacrifices in ejecting the invader from the invaded territory alter its legal position, whether the sacrifices have been made disinterestedly or not. It was not obliged to make them. On the other hand it cannot be placed in a worse position by being at war with the intrusive state than it would otherwise have held. The legal effects of a war are not modified by the fact that one of the parties to it is waging another wholly distinct war at the same time. If therefore a conquest seems, either from the attitude taken up by the conquered population towards the victor, or from his apparent solidity of possession, to be so

<sup>1</sup> Heffter, § 188 and § 184<sup>a</sup>; Bluntschli, § 729. Woolsey (§ 145) follows Heffter.

Perhaps the value of M. Bluntschli's opinion is somewhat affected by the fact that he instances 'les négociations entre la Prusse et le duc Frédéric d'Augustenbourg, au sujet des duchés de Schleswig et de Holstein, 1865-6, après que ces duchés eurent été affranchis par la Prusse de la domination danoise' as an example of the right course of conduct to adopt. But it is not quite clear how the case is an example at all of the class of cases under consideration.

settled that a state would be justified if at peace with him in recognising it as definitive, there can be no reason for denying to an enemy the right of making up its own mind whether occupation continues or conquest has taken place ;— he is merely prevented by the nature of the relation existing between him and the invader from showing what opinion he has formed until the course of his war leads him to attack the territory in question. PART III.  
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In all cases then in which conquest has unquestionably not been consolidated, and in which the territory of a state is therefore only occupied, the state recovers its existence and all the rights attendant on it as of course so soon as it is relieved from the presence of the invader. Where, on the other hand, there is reasonable doubt as to whether a state is occupied or conquered, the third state must be allowed to determine the point for itself, and to act accordingly <sup>1</sup>.

§ 166. The circumstance that commercial vessels and their cargoes belong to private owners and that they are generally of more or less considerable value, coupled with the fact that recaptors are generally fellow-subjects of the original owners of recaptured property, has led to the adoption of certain usages with respect to maritime recapture by which the application of the right of postliminium is somewhat blurred. On the one hand, it has been thought well to reward recaptors by paying them salvage in all cases, so that property never returns unconditionally to the owner ; on the other, property is as a rule returned to him upon payment of salvage, notwithstanding that the enemy may have evidenced his capture by taking the captured ship into a safe place, or even by formal condemnation in his courts. Recapture.

In 1632 the Dutch government, in the interests of com-

<sup>1</sup> Of course where the ejecting state appears ostensibly in the character of a liberator it is bound by its own professions. In the case of Genoa, for example, it may be a question whether England by the general attitude which she assumed towards the Italian populations did not morally bind herself to restore such of them as might wish it to the position which they occupied before the French conquest.

PART III. merce, issued a placard directing restitution to the owners  
 CHAP. V. of vessels recaptured before being taken into an enemy's port, and by a decree of 1666 they regarded property in them as unchanged until after sale and a fresh voyage to a neutral port. In 1649 England ordered restitution of all British vessels to the owners on payment of salvage irrespectively of time or of the manner in which they had been dealt with by the enemy; and the practice has been continued by successive Prize Acts to the present time, an exception only being made in the case of ships which before recapture have been commissioned by the enemy as vessels of war<sup>1</sup>. Gradually a like mode of dealing with recaptured ships has been adopted by other nations, and the municipal laws of the United States, Portugal, Denmark, Sweden, Holland, France and Spain now direct their restitution. The conditions under which restitution is made are not however altogether similar. The United States restores only when the recapture has been effected before condemnation in a prize court; France restores vessels retaken by a public ship of war after twenty-four hours' possession by an enemy, but leaves them as prizes in the hands of a privateer; Spain gives greater indulgence to neutrals than to her own subjects and returns recaptured vessels to the former, unless they are laden with enemy's property; Portugal, Denmark, Sweden, and Holland follow the English practice of making restitution in all cases. Payment of Salvage is always required, but the amount varies in different countries. In France one tenth of the value is exacted; in England the amount given is one eighth, except in cases of special difficulty and danger; in Spain the rate is one eighth if the recapture has been effected by a public ship of war, and one sixth if a privateer is the recaptor; in Portugal the corresponding rates are one eighth and one fifth respectively; in Denmark one third and in Sweden one half is demanded; the normal rate in the United

<sup>1</sup> Bynk., Quæst. Jur. Pub. l. i. c. iv; Nostra Signora del Rosario, iii Rob 10; L'Actif, Edwards, 185; The Ceylon, i Dodson, 118-9; 27 and 28 Vict. c. 25.

States is one eighth of the value, but other rates are levied in special cases<sup>1</sup>. In the majority of instances the above regulations have been made for municipal purposes, but it is usual to extend the same treatment to allies and friends as is applied by the recapturing state to its own subjects, provided the allied or friendly government acts upon the principle of reciprocity; if it give effect to a less liberal rule, its own practice is followed<sup>2</sup>.

PART III.  
CHAP. V.

<sup>1</sup> 27 and 28 Vict. c. 25; Twiss, ii. § 174-5; Wheaton, Elem. pt. iv. ch. ii. § 12; Pistoye et Duverdy, ii. 105. As between England and France the treatment to be applied is still dictated by a treaty of 1786; if an enemy has taken a vessel which is recaptured after less than twenty-four hours' possession it is restored to its owner on payment of a third of its value; if it is recaptured after more than twenty-four hours' possession it belongs to the recaptors. Ib. 109.

<sup>2</sup> *The Santa Cruz*, 1 Rob. 60. In the United States it is provided by Act of Congress that when a practice is known to exist in a foreign country with respect to vessels of the United States, such practice is to be observed with respect to vessels of that country, except that they are not to be returned if they have been condemned in a prize court; where no such practice is known the rules applicable to subjects of the United States are to be followed. Wheaton, Elem. pt. iv. ch. ii. § 12; *The Schooner Adeline*, 9 Cranch, 288.

## CHAPTER VI.

### ENEMY CHARACTER.

PART III.  
CHAP. VI.  
—

Persons  
and pro-  
perty  
affected  
with an  
enemy  
character,  
other than  
subjects  
and pro-  
perty of  
an enemy  
state.

§ 167. INDIVIDUALS being identified with the state to which they belong, and it being, besides, a special principle of the laws of war that the subjects of a state are the enemies of its enemy, it might *primá facie* be expected that the whole of the subjects of a state would in all cases be the enemies of a state at war with it. On the other hand, it might also be expected that the subjects of a state at peace with both parties could in no case be looked upon as the enemies of either. The bare legal fact however that a person is or is not the subject of a state is of less practical importance in war than the consideration that he does or does not render assistance directly or indirectly to the enemy. It was seen in the chapter on the general principles of the law as between belligerents and neutrals that the former are allowed in certain cases to restrain neutral individuals from trade with the enemy, and to impose penalties for a breach of their rules. Where the association of the neutral person with the enemy is closer; where the assistance is given, not accidentally, but because the neutral person has chosen to identify himself with the enemy by taking service in the country or by establishing himself in it, it is natural that a belligerent should be permitted to go further, and to regard the neutral individual as himself hostile, at least to the extent that his acts are of advantage to the enemy, or that he presents

himself as a member *de facto* of the enemy community. On the other hand, when the subject of a belligerent state has established himself in a neutral country, the closeness with which a person is identified with the place where he finds a home operates to free him, in so far as he is associated with it rather than with his own country, from the consequences of his belligerent character; to seize his ships or his goods would be to put a stress, not upon the enemy, but upon the neutral state. With these reasons of a merely practical nature the effects of sovereignty, or in other words, of the authority which a state exercises over foreigners within its territory, combine to prevent the attribution of enemy character from corresponding exactly with the fact of national character. A foreigner living and established within the territory of a state is to a large extent under its control; he cannot be made to serve it personally in war, but he contributes by way of payment of ordinary taxes to its support, and his property is liable, like that of subjects, to such extraordinary subsidies as the prosecution of a war may demand. His property being thus an element of strength to the state, it may reasonably be treated as hostile by an enemy. Conversely, when the foreigner lives in a neutral country, he is so far subject to its sovereignty that it can restrain him from taking advantage of its territory to do acts of hostility against the enemy of his state, and it is responsible for his acts, if he does them. For the purposes of the war therefore he is in reality a subject of the neutral state. Finally, if property be regarded separately, although on the one hand it cannot escape from the consequences of enemy ownership, it may on the other be necessarily hostile by its origin irrespectively of a neutral national character of its owner, and it is also capable of being so used in the service of a belligerent as to fall completely under his control, and to become his for every purpose of his hostilities.

Enemy character may thus attach either to persons of neutral national character and to their property as attendant

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PART III. on them, or to property owned by neutrals in virtue of its  
 CHAP. VI. origin or of the use to which it is applied.

Effect of  
 domicil.

§ 168. The chief test of the existence of such an identification of a neutral subject with an enemy state as will suffice to clothe him with an enemy character is supplied by the fact of domicil.

What constitutes  
 domicil  
 for belligerent purposes.

For belligerent purposes a person may be said to be domiciled in a country when he lives there under circumstances which give rise to a reasonable presumption that he intends to make it his sole or principal place of residence during an unlimited time. The circumstances upon which such a presumption can be founded are the two, which may be united in infinitely varying proportions, of the past duration and the object of residence. If a person goes to a country with the intention of setting up in business he acquires a domicil as soon as he establishes himself, because the conduct of a fixed business necessarily implies an intention to stay permanently; if on the other hand he goes for a purpose of a transitory nature, he does not necessarily acquire a domicil, even though he lingers in the country after his immediate object is satisfied; he only does so if at last by the length of his residence he displaces the presumption of merely temporary sojourn which is supplied by his original purpose<sup>1</sup>. Of these two elements of time and object, time is nevertheless the more important ultimately. Lord Stowell said with regard to it that 'of the few principles that can be laid down generally, I may venture to hold that time is the grand ingredient in constituting domicil. I think that hardly enough is attributed

<sup>1</sup> The first of these examples may be illustrated by the case of Mr. Whitehill who 'arrived at St. Eustatius only a day or two before Admiral Rodney and the British forces made their appearance; but it was proved that he had gone to establish himself there, and his property was condemned.' (Referred to in *The Diana*, v Rob. 60.) The two latter are covered by the language of Lord Stowell in the case of the *Harmony*, quoted in the text.

Foreign writers generally devote little attention to questions of enemy character. English and American writers merely reflect the doctrines laid down in the decisions rendered by the courts in the two states; it is not therefore usually necessary to refer to them.

to its effects, in most cases it is unavoidably conclusive. . . . PART III.  
 I cannot but think that against a long residence, the plea CHAP. VI.  
 of an original special purpose could not be averred; it must  
 be inferred in such a case that other purposes forced them-  
 selves upon' the person living in a foreign state 'and mixed  
 themselves with his original design, and impressed upon him  
 the character of the country where he resided. Suppose a  
 man comes into a belligerent country at or before the begin-  
 ning of a war, it is certainly reasonable not to bind him too  
 soon to an acquired character, and to allow him a fair time  
 to disengage himself, but if he continues to reside during a  
 good part of the war, contributing by payment of taxes or  
 other means to the strength of that country, I am of opinion  
 that he could not plead his special purpose with any effect  
 against the rights of hostility. If he could, there would be no  
 sufficient guard against the fraud and abuses of masked, pre-  
 tended, original and sole purposes of a long-continued residence.  
 There is a time which will estop such a plea; no rule can fix  
 the time *à priori*, but such a time there must be. In proof of  
 the efficacy of mere time it is not impertinent to remark that  
 the same quantity of business which would not fix a domicile  
 in a certain space of time would nevertheless have that effect,  
 if distributed over a larger space of time. Suppose an  
 American came to Europe with six contemporary cargoes of  
 which he had the present care and management, meaning  
 to return to America immediately; they would form a dif-  
 ferent case from that of the same American coming to any  
 particular country of Europe with one cargo, and fixing  
 himself there to receive five remaining cargoes, one in each  
 year successively. I repeat that time is the great agent in  
 this matter; it is to be taken in a compound ratio of the  
 time and the occupation, with a great preponderance on the  
 article of time; be the occupation what it may, it cannot  
 happen but with few exceptions that mere length of time  
 shall not constitute a domicile<sup>1</sup>.

<sup>1</sup> The Harmony, ii Rob. 322.

PART III. As domicil is acquired for private purposes of business or  
CHAP. VI.  
 Change of domicil during war. pleasure, and the consequences to a man of its possession by him flow, not from an attitude of hostility on his part, but from the accidental circumstance that his conduct is of advantage to a belligerent, he is not tied down to the domicil in which he is found at the beginning of war. So soon as he actually removes elsewhere, or takes steps to effect a removal in good faith and without intention to return, he severs his connection with the belligerent country. He thus recovers his friendly character, and with it recovers also the rights of a friend. In 1783, for example, a Mr. Johnson, an American subject, came to England to trade, and by staying there till 1797 acquired an English domicil. Some time before the latter year he had formed an intention of leaving, and during its course he actually left. Before his departure however a vessel belonging to him, which he had sent out in order that she should be freighted for America, but which an agent, supposing that Mr. Johnson would have reached the United States before the completion of the voyage, had sent to ports enemy of England and then back to the latter country, was detained there. It was held that as 'the national character of Mr. Johnson as a British merchant was founded on residence only, as it was acquired by residence, and rested on that circumstance alone, he was in the act of resuming his original character, and is to be considered as an American, from the moment he turns his back on the country where he has resided on his way to his own country; the character that is gained by residence ceases by residence; it is an adventitious character which no longer adheres to him from the moment that he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi*<sup>1</sup>.'

<sup>1</sup> The Indian Chief, iii Rob. 12. For an application of the principle during the Crimean War under the somewhat delicate circumstances of the sale of a vessel, in view of the outbreak of war, by a Russian father to a son domiciled in England, who afterwards removed to Denmark in order to carry on a neutral trade, see the *Baltica*, Spinks, 264. For an American decision, see the *Venus*,

A person though not resident in a country may be so associated with it through having, or being a partner in, a house of trade there, as to be affected by its enemy character, in respect at least of the property which he possesses in the belligerent territory; if he is a merchant in two countries, of which one is neutral and the other belligerent, he is regarded as neutral or belligerent according to the country in which a particular transaction of his commerce has originated. Things are different when a merchant living in a neutral country, and carrying on an ordinary neutral trade, has merely a resident agent in the belligerent state, the agent being looked upon as only an instrument for facilitating the conduct of a trade which in other respects is not distinguishable from that of other neutral merchants. If however the trade is in itself such as to create any special association, through the concession of exceptional privileges or otherwise, between the merchant and the belligerent state, the former becomes impressed with a hostile character relatively to enemies of the state, notwithstanding the fact of his absence. Thus an American, possessing a tobacco monopoly in the Caraccas, but not residing in Spanish territory, and conducting his trade through an agent, was held to have contracted a Spanish mercantile character<sup>1</sup>.

The application of the foregoing rules is not modified in the practice of England and the United States by the fact that a merchant falling under their operation is a consul either for a neutral or a belligerent power. He has the mercantile character of the country in which he is domiciled, and he receives no protection or harm in his private affairs from his official position. If his property is liable to condemnation upon his mercantile character it is condemned; and on the other hand, if he is domiciled in neutral territory,

viii Cranch, 280. For a case in which the change of domicil was held to be not effected in good faith, see the *Ernst Merck*, Spinks, 89.

<sup>1</sup> *The Jonge Classina*, v Rob. 302; *The Friendship*, iv Wheaton, 105; *The Anna Catherina*, iv Rob. 119; *The Portland*, iii Rob. 44; Calvo, § 769.

PART III. he does not forfeit his neutral character by acting as consul  
 CHAP. VI. of a belligerent state. The French practice is so far different  
 — that the property of a neutral subject, consul for a neutral  
 state in a belligerent country, and carrying on trade in the  
 latter, is held to be itself neutral<sup>1</sup>.

Effect of  
 permanent  
 civil or  
 military  
 employ-  
 ment.

When a person belonging to a neutral state takes per-  
 manent civil or military service with a foreign state he  
 identifies himself so fully with it that he becomes the enemy  
 of its enemies for every purpose. When he merely contracts  
 to do specific services, he becomes an enemy to the extent, and  
 for the purposes, of those services. The occasions upon which  
 it may be inferred from the conduct of a neutral that he has  
 made a contract of this kind will be more conveniently  
 discussed elsewhere than here<sup>2</sup>.

How pro-  
 perty be-  
 comes  
 affected  
 with an  
 enemy  
 character.

§ 169. Property is considered to be necessarily hostile by  
 its origin when it consists in the produce of estates owned by  
 a neutral in belligerent territory, although he may not be resi-  
 dent there. Land, it is held, being fixed, is necessarily asso-  
 ciated with the permanent interests of the state to which  
 it belongs, and its proprietor, so far from being able to  
 impress his own character, if it happens to be neutral, upon  
 it or its produce, is drawn by the intimacy of his association  
 with property which cannot be moved into identification in  
 respect of it with its national character. The produce of  
 such property therefore is liable to capture under all circum-  
 stances in which enemy's property can be seized<sup>3</sup>.

Property, not impressed with a belligerent character by its  
 origin, and belonging to a neutral, becomes identified with a  
 belligerent by being subjected wholly to his control, or being  
 incorporated into his commerce. Thus, a vessel owned by  
 a neutral, but manned by a belligerent crew, commanded  
 by a belligerent captain, and employed in the trade of a

<sup>1</sup> *The Indian Chief*, iii Rob. 27 ; *Le Hardi contre la Voltigeante*, Pistoye et  
*Duverdy*, i. 321 ; *La Paix*, ib.

<sup>2</sup> See Pt. iv. ch. vi.

<sup>3</sup> *The Phoenix*, v Rob. 20 ; *Thirty Hogsheads of Sugar v. Boyle*, ix  
*Cranch*, 191.

belligerent state, is deemed to be a vessel of the country from which she navigates; and the acceptance of a pass from a belligerent state, or the fact of sailing under its flag, entails the same consequence<sup>1</sup>.

§ 170. Besides the foregoing points connected with the possibility of the acquisition of an enemy character by neutral persons and things, questions present themselves with regard to—

PART III.  
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Further  
questions.

1. Things originally belonging to an enemy, but sold to a neutral during war, or shortly before its commencement under circumstances admitting of the suspicion of sale in anticipation of war.
2. Goods consigned by neutrals from neutral ports to an enemy consignee, or *vice versa*.
3. Places belonging to a belligerent which are in the military occupation of his enemy.
4. Places under double or ambiguous sovereignty.

§ 171. As a general rule a neutral has a right to carry on such trade as he may choose with a belligerent. But the usages of war imply the assumption that the exercise of this right is subjected to the condition that the trade of the neutral shall not be such as to help the belligerent in prosecuting his own operations, or in escaping from the effects of those of his enemy. When neutral commerce produces this result the belligerent who suffers from the trade is allowed to put it under such restraint as may be necessary to secure his freedom of action. Hence, as private property is liable to capture at sea, and as an unlimited right of transfer from belligerent to neutral owners, irrespectively of time or place, might evidently be used as a means of preserving belligerent property from confiscation, a belligerent may refuse

Questions  
with re-  
gard to  
things sold  
by an  
enemy  
during  
war.

<sup>1</sup> The *Vigilantia*, i Rob. 13. The navigation laws of some states are so lax that international conflicts might readily arise out of the above rule. To take an extreme case, in Colombia a vessel owned solely by foreigners, and with a foreign crew, may be registered as Colombian, so that a ship not even owned by a Colombian neutral might endeavour to cover herself with Colombian neutrality while carrying on a purely belligerent trade.

PART III. to recognise any transfers of property which seem to him to  
 CHAP. VI. be made with fraudulent intent; and as a matter of fact  
 sales of such property as is liable to capture at sea are not  
 indiscriminately permitted.

The right which a neutral has to carry on innocuous trade with a belligerent of course involves the general right to export from a belligerent state merchandise which has become his by *bond fide* purchase. Vessels, according to the practice of France, and apparently of some other states, are however excepted on the ground of the difficulty of preventing fraud. Their sale is forbidden, and they are declared good prize in all cases in which they have been transferred to neutrals after the buyers could have knowledge of the outbreak of a war<sup>1</sup>. In England and the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinised, and a transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel, or a right to its restoration at the conclusion of the war<sup>2</sup>.

With respect to vessels and merchandise, belonging to an enemy, in transit upon the ocean, the French doctrine gave no scope for special usage until the freedom of neutral goods on board belligerent vessels was accepted by the Declaration of Paris. A valid sale of a vessel being always impossible during war, enemy goods on board an enemy vessel necessarily remained liable to capture; and enemy goods in course of transport by a neutral being protected by the flag, the effect of sale did not need to be considered. By English and American

<sup>1</sup> Pistoye et Duverdy, ii. 3. The sale of a vessel, to be good, must be proved by authentic instruments anterior to the commencement of hostilities, and must be registered by a public officer. The practice dates back to 1694, when it was defined by the Règlement of Feb. 17 of that year. Valin, Ord. de la Marine, ii. 246.

<sup>2</sup> The Bernon, i Rob. 102; Halleck, ii. 139.

custom all sales during war of property *in transitu* are bad, the probability that they are fraudulently intended being thought to be so high as to amount to a practical certainty; in the words of Lord Stowell, 'if such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect'.<sup>1</sup>

Transfer *in transitu* being legitimate in time of peace, transfers effected up to the actual outbreak of war are *prima facie* valid; where however it appears from the circumstances of the case that the vendor has sold, to the knowledge of the purchaser, in contemplation of war the contract is invalidated, notwithstanding that the purchaser may have been in no way influenced in buying by a wish to assist the vendor. The transaction is held to be in principle the same as a transfer *in transitu* effected during the progress of war. 'The nature of both contracts,' says Lord Stowell, 'is identically the same, being equally to protect the property from capture in war, not indeed in either case from capture at the present moment, but from the danger of capture when it is likely to occur. The object is the same in both instances, to afford a guarantee against the same crisis. In other words, both are done for the purpose of eluding a belligerent right, either present or expected. Both contracts are framed with the same *animo fraudandi*, and are in my opinion justly subject to the same rule'.<sup>2</sup>

§ 172. It is the general rule that a consignor, on delivering goods ordered to the master of a ship, delivers them to him as the agent of the consignee, so that the property in them is vested in the latter from the moment of such delivery. In time of peace this rule may be departed from by special agreement, or may be changed by the custom of a particular trade, so that the property in the goods may remain in the consignor until their arrival in the port of the consignee

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Transfer of property by an enemy immediately before war.

Goods consigned by neutrals from neutral ports to an enemy consignee, or vice versa.

<sup>1</sup> The Vrow Margaretha, 1 Rob. 338; The Ann Green, 1 Gallison, 291; Halleck, ii. 137.

<sup>2</sup> The Jan Frederick, v Rob. 133.



PART III. and actual delivery to him. In time of war however, the  
 CHAP. VI. English and American courts, keenly alive to the opening  
 which would be given to fraud by allowing special agree-  
 ments to be made, refuse to recognise them, as between a  
 neutral consignor and an enemy consignee, whether they have  
 been concluded during the progress of hostilities or in con-  
 templation of them; and the breadth with which it is stated  
 by Mr. Justice Story that in time of war 'property con-  
 signed to become the property of an enemy upon its arrival  
 shall not be permitted to be protected by the neutrality of  
 the shipper,' may give rise to a doubt whether proof of a  
 custom of trade varying from the common rule would be  
 admitted to prevent property shipped by a neutral to an  
 enemy on the conditions of the custom from being confiscated.  
 When the consignor is an enemy, as an attempt to disguise  
 the true character of property would take the form, not of  
 setting up a fictitious contract, but of hiding the existence  
 of a real one, evidence is required that the consignee is as  
 a matter of fact the owner. It must appear that he is bound  
 absolutely to accept the goods, and that, except in the case  
 of his insolvency, the consignor has no power to reclaim  
 them<sup>1</sup>. French practice seems to be different<sup>2</sup>.

Places be-  
 longing to  
 a belli-  
 gerent,  
 which are  
 in the  
 military  
 occupation  
 of his  
 enemy.

§ 173. Although the national character of a place and its  
 inhabitants is not altered by military occupation on the part  
 of an enemy, yet for many belligerent purposes they are  
 necessarily treated as hostile by their legitimate sovereign.  
 They are in fact under the control of the enemy, and to treat  
 them as friendly would be to relieve him from the pressure  
 and losses of war. Trade with them, consequently, is sub-  
 jected to the same restrictions as trade with the enemy and  
 his territory, and property the produce of the country or  
 belonging to persons domiciled there is confiscable under the  
 same conditions as enemy's property. When, for example,  
 the island of Santa Cruz was captured from Denmark by the

<sup>1</sup> The Packet de Bilbao, ii Rob. 133; The Ann Green, i Gallison, 291; The Francis, ib. 450; Kent, Comm. i. 86.

<sup>2</sup> Calvo, § 922.

British, some sugar shipped from there on board an English ship was captured by an American privateer, and was condemned as British property, Chief Justice Marshall saying that 'some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation, although acquisitions made during war are not considered as permanent, until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as part of the domain of the conqueror, so long as he retains the possession and government of them<sup>1</sup>.'

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It is to be regretted that this necessary doctrine has been applied by the English courts with a severity in the exercise of which consistency has been somewhat forgotten. It is reasonable that property which has become hostile through the conquest by an enemy of the port at which its owners are domiciled shall be condemned; but if this be done, no good cause can be shown for deciding that hostile property shall not become friendly to a belligerent state from the moment at which the latter obtains possession of the port to which the property belongs. Lord Stowell however ruled otherwise. A vessel, owned by merchants residing at the Cape of Good Hope, was captured on a voyage from Batavia to Holland. The voyage was begun before the conquest of the Cape by the English, but the capture was effected afterwards. Lord Stowell condemned the vessel upon the ground, which would not have been taken up in the inverse case, and which, the change of character being involuntary, was not really in point, that the ship, 'having sailed as a Dutch ship, her character during the voyage could not be changed<sup>2</sup>.'

§ 174. It is possible for a place to possess at the same moment a belligerent and a neutral character. So long, for example, as the sovereignty of Turkey is not extinguished in Bosnia and the Herzegovina or in Cyprus, these provinces

Places under double or ambiguous sovereignty.

<sup>1</sup> *Thirty Hogsheads of Sugar*, ix Cranch, 195.

<sup>2</sup> *The Danckebaar Africaan*, i Rob. 107.

PART III. are probably capable of being belligerent territory in virtue  
 CHAP. VI. of Austrian or English authority, and neutral territory in  
 — respect of Turkey, or *vice versa*; and while the German Confederation existed, that part of its territory which belonged to Austria or Prussia was always in this equivocal position whenever either of those states was at war. On one occasion the awkwardness arising from a double character was brought strongly into notice. During the Austro-Sardinian war of 1848 an Austrian squadron took refuge from the Sardinian fleet in the port of Triest, which belonged both to Austria and the Confederation. A blockade was declared by the Italians on the grounds that Triest had become a *place de guerre* by being fortified with a castle and several batteries which were garrisoned by a numerous body of enemy troops, that the Austrian squadron had found refuge there, that the place had also been used for aggressive purposes, and that fire had been opened from it upon the Sardinian vessels. Upon the consuls of the various German states protesting against the blockade, the Italian admiral declared that he would recognise that the town belonged to the Confederation when the German colours were hoisted instead of the Austrian flag. Subsequently, after communication with his government, he announced that he would allow all merchant vessels, whether Austrian or foreign, to go in and out, provided that they had on board no soldiers, arms, or munitions of war, or articles of contraband for a naval force; all vessels were to be visited, and were only to be permitted to enter or come out by day. While therefore the blockade was made as little onerous as possible, it was maintained in principle. The minister for foreign affairs of the Confederation protested against the measures taken by Sardinia; denying that as a matter of fact Triest had been used as a base of offensive operations, he argued that a state in amity with Germany could have no right to throw obstacles in the way of free communication between one of its ports and foreign countries, that in time of peace no right of visit existed, and that articles con-

Case of  
Triest in  
1848.

traband of war were necessarily innocent from the neutrality of their port of consignment<sup>1</sup>. Supposing the fact to be, as stated by the minister, that Triest had not really been used for offensive purposes, the protest put forward on behalf of the Confederation amounts to a claim that where any shadow of over-sovereignty exists, and the one sovereign is neutral, territory shall be taken to be neutral notwithstanding that it is used as a place of retreat for defeated or overmatched forces and as a means of obtaining munitions of war and other supplies. The difference between such use and employment as a base of offensive operations is too slight to make it important to separate them in principle. If then any claim of the sort were admitted, it could hardly stop short of covering fully with the neutrality of an over-sovereign all belligerent use of territory in which over-sovereignty exists. Conversely the belligerency of an over-sovereign would taint such territory, even though the whole effective authority within it were in the hands of a neutral.

The contention of the German Confederation was obviously inadmissible. It would indeed have been barely worth while to state it if it did not serve to bring into relief the necessity of frankly adopting the alternative view that the belligerency or neutrality of territory subject to a double sovereignty must be determined for external purposes, upon the analogy of territory under military occupation, by the belligerent or neutral character of the state *de facto* exercising permanent military control within it. As was seen in the last section, when a place is militarily occupied by an enemy, the fact that it is under his control, and that he consequently can use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil. In like manner, but with stronger reason, where sovereignty is double or ambiguous a belligerent must be permitted to fix his attention upon the crude fact of the exercise of power. He must be allowed to deal his enemy blows wherever he finds him in

<sup>1</sup> De Martens, Nouv. Rec. Gén. xii. 497-506.

PART III. actual military possession, unless that possession has been  
 CHAP. VI. given him for a specific purpose, such as that of securing  
 internal tranquillity, which does not carry with it a right to  
 use the territory for his military objects. On the other  
 hand, where a scintilla of sovereignty is possessed by a  
 belligerent state over territory where it has no real control,  
 an enemy of the state, still fixing his attention on facts, must  
 respect the neutrality with which the territory is practically  
 invested.

Effect of  
 a personal  
 union  
 between  
 states.

§ 175. It has been pointed out in a former chapter that  
 states joined by a personal union are wholly separate states,  
 which happen to employ the same agents for the management  
 of their affairs, and that they are not responsible for each  
 other's acts. It is the clear rule therefore that either may  
 remain neutral during a war in which the other is engaged.  
 It is only necessary so far to qualify this statement as to  
 say that any suspicion of indirect aid given by the neutral  
 state, or of any fraudulent use of the produce of its taxes  
 or other resources, gives the enemy of the belligerent power  
 a right to disregard the character which the associated state  
 claims to possess. The connection between the two states  
 is such, wherever at least the common sovereign may happen  
 not to be trammelled by a constitution, that a right of  
 ceasing to respect a neutrality thought to be unreal may  
 fairly be held to arise upon less evidence of non-neutral conduct  
 than would be required in the case of two wholly separate  
 countries.

Case of the  
 Convention  
 of Sulstin-  
 gen.

The irresponsibility of one of two states joined by a personal  
 union for the acts of the other has usually, but not quite in-  
 variably, been respected by belligerents. In 1803 a case, in which  
 one of two states united by a personal tie was improperly  
 attacked on account of its connection with the other, arose out  
 of the personal union between England and Hanover. George  
 III studiously kept distinct his position as Elector from that  
 which he held as King; in 1795 the French government  
 by allowing him to accede to the treaty of Basle in his former

capacity had shown that they understood and acknowledged the reality of the severance which he made; and the principle of his neutrality as Elector had been confirmed both on the occasion of the treaty of Luneville, and by arrangements subsequently made with respect to the indemnities of German states. On the outbreak of war however between France and England in 1803 a French corps entered Hanover and compelled the electoral troops to capitulate at Suhlingen. A copy of the capitulation was sent over by the French government to Lord Hawkesbury, Secretary of State for Foreign Affairs, accompanied with the announcement that Hanover had been occupied as a pledge for the evacuation of Malta, with a demand that the capitulation should be ratified, and the statement that if it were not ratified Hanover should be treated with all the rigours of war, as a country which being abandoned by its sovereign had been conquered without capitulation. Lord Hawkesbury, in refusing on behalf of George III to do any act which would imply an admission of identity between England and Hanover, pointed out that the neutrality of the latter country was not assumed with reference to the then existing circumstances, that it had been maintained during the former war, and that it had been recognised in the ways mentioned above. The French government nevertheless declared the Convention of Suhlingen to be null, and imposed a fresh and less favourable capitulation upon the Hanoverian army<sup>1</sup>.

<sup>1</sup> De Martens, *Rec.* viii. 86; Alison's *Hist. of Europe* (ed. 1843), v. 140; De Garden, *Hist. des Traités de Paix*, viii. 192.

## CHAPTER VII.

### MEANS OF EXERCISING THE RIGHTS OF OFFENCE AND DEFENCE.

**PART III.** § 176. THE rights of offence and defence possessed by a  
**CHAP. VII.** belligerent community are exercised through the instru-  
mentality of armed forces, and by means of military and  
**Division of the subject.** naval operations. The legal questions which present themselves with reference to the constitution of armed forces being necessarily distinct from those having reference to the manner in which such forces may act, the general subject of the law dealing with the rights of offence and defence is primarily divided into two heads, the first of which may be again conveniently divided, since though the principles which govern continental and maritime warfare are identical, the differences which exist in the external conditions under which the two are carried on lead to differences in the particular rules affecting the constitution of the forces employed.

**Hostilities on land.** § 177. Hostilities on land are for the most part carried on  
**Question as to who are legitimate combatants.** by the regular army of a state. The characteristics of this force from a legal point of view may be said to be that it is a permanently organised body, so provided with external marks that it can be readily identified, and so under the efficient control of the state that an enemy possesses full guarantees for the observance by its members of the established usages of war. It is the instrument expressly provided

for the conduct of hostilities, and expressly adapted to carry them on in a legal manner.

PART III.  
CHAP. VII.

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But belligerent acts are also performed by bodies of men less formally organised, and the legal position of some of these is not yet so defined as to be in all cases clear.

It has been seen that although all the subjects of a belligerent state were originally in fact, and still are theoretically, the enemies of the enemy state, a distinction has long been made, under the influence of humanity and convenience, between combatant and non-combatant individuals. The latter are not proper objects of violence; the former may be killed and made prisoners, but when captured they must be treated in a specified way. It is evident that the treatment which is accorded to the two classes respectively, and the distinctive privileges which they enjoy, being caused by the difference in their character, must have been conceded on the tacit understanding that the separation between them shall be maintained in good faith. Non-combatants are exempted from violence because they are harmless; combatants are given privileges in mitigation of the full right of violence for the express reason that they hold themselves out as open enemies. If either class were able to claim the immunities belonging to the other without permanently losing those proper to itself, an enemy would have made concessions without securing any corresponding advantage. Non-combatants would not be harmless and combatants would not be known. Those persons only therefore can properly do belligerent acts and claim belligerent privileges on being captured who openly manifest their intention to be combatant; and a belligerent, before granting such privileges, has obviously the right to exact evidence of intention. In the case of an invading army the distinction is easily made. With the exception of surgeons and other persons, whose employments, though ancillary to war, are conventionally regarded as peaceful, all persons must be taken to be combatant. But in the case of defensive forces the



**PART III.** legitimate demands of an invader tend to conflict with the  
**CHAP. VII.** unrestricted right of self-defence, which is possessed by the individual as a component part of the assailed community. It is impossible to push the doctrine that combatants and non-combatants must remain separate to its logical results when the duty and sentiment of patriotism, and the injury, which even in modern warfare is always suffered by private persons, combine to provoke outbursts of popular resistance. Persons must sometimes be admitted to the privileges of soldiers who are not included in the regular army. At the same time the interests of invading belligerents lead them to reduce the range of privilege as much as possible. Naturally practice shows the marks of these opposing influences. It is confused and not a little uncertain.

The evidences of intention to form part of the combatant class, which belligerents have been in the habit of exacting, fall under the heads of—

1. The possession of an authorisation given by the sovereign.
2. The possession of a certain number of the external characteristics of regular soldiers.

Whether  
an authori-  
sation from  
the sove-  
reign is ne-  
cessary.

§ 178. The rule that permission from the sovereign is the condition of legitimate warfare as a matter of historical fact sprang rather from the requirements of sovereignty than from those of the belligerent rights possessed by an enemy. When the notions involved in the idea of the modern state began to be formed, sovereigns in investing themselves with the exclusive right to make war, by implication kept to themselves the right of regulating the war when begun, and so refused to their subjects the power of attacking the common enemy when and how they pleased. Subjects acted simply as the agents of the sovereign. At first they were all agents. The want of fleets and sufficient armies compelled sovereigns to rely upon the population at large; leave therefore was usually given in a general manner at the beginning of war, and the declaration that 'we permit and give leave to all our

subjects to take up arms against the above-named by sea and land,' or the order to 'courir sus' upon all the subjects of the enemy rendered warfare permissible to every one who chose to undertake it<sup>1</sup>. But as war became more systematic, offensive operations were necessarily conducted by the regular forces of the state; and in defence it was found, either that irregular levies plundered their fellow-countrymen without doing service against the enemy, or that the rising of an unarmed peasantry in despair was merely the signal for a massacre. The old forms of permission continued, but they ceased to have a natural meaning<sup>2</sup>; and in the eighteenth century hostilities on land were in practice exercised only by persons furnished with a commission from their sovereign. Belligerents acting on the offensive were not slow to give to facts an interpretation in consonance with their interests; and although the right of taking up arms in its own defence with the permission of the sovereign might still be conceded in books to an invaded population<sup>3</sup>, it became the habit to refuse the privileges of soldiers not only to all who acted without express orders from their government, but even to those who took up arms in obedience to express orders when these were not addressed to individuals as part of the regular forces of the state<sup>4</sup>. The doctrine which was thus on the

<sup>1</sup> *Le Cry de la Guerre ouverte entre le Roi de France et l'Empéreur* in the *Papiers d'Etat du Cardinal de Granvelle*, ii. 630; Dumont, vii. i. 323.

<sup>2</sup> For instance, Vattel says that in the eighteenth century the order to 'courir sus' was understood as meaning that persons and things belonging to the enemy were to be detained if they fell into the hands of those to whom the order was addressed, but that it gave no right of offensive action; liv. iii. § 227.

<sup>3</sup> Vattel, liv. iii. § 223.

<sup>4</sup> De Martens, *Précis*, § 271. See the Proclamations of the Austrians on entering Provence in 1747 and Genoa in 1748 (*Moser, Versuch*, ix. i. 232-6), of the French on landing in Newfoundland in 1762 (*ib.* 240), and of the French on entering Hanover in 1761 (*Ann. Register* for 1761, 278).

Jomini (*Guerres de la Revolution*, viii. 137) in speaking of the execution, by Napoleon's orders in 1796, of the magistrates of Pavia and the slaughter of the peasants who had endeavoured to defend the town, says that 'le droit public moderne avait jusqu'alors tiré une ligne de démarcation positive entre le citoyen

PART III. point of being fixed was however to a great extent broken  
 CHAP. VII. down by the events of the French revolutionary and imperial wars. France, Prussia and Russia all called upon their people at different times to embody themselves in levies which until then had not been recognised as legitimate, and other states encouraged or permitted still more irregular risings. No doubt nations were little willing to accord to others the rights of defence which they used for themselves; but the change in the character of wars from being mere contests of princes, as they generally were in the eighteenth century, to becoming struggles between peoples, as they generally were in the beginning of the present century, left its trace upon opinion. Of the writers who more immediately succeeded the Napoleonic period De Martens appears to incline to the old doctrine; but Wheaton gives combatant privileges not only to the regular forces of a nation, but to 'all others called out in its defence, or spontaneously defending themselves in case of urgent necessity, without any express authority for that purpose;' and Klüber recognises levies *en masse*, and thinks besides that inhabitants of a fortress assisting in its defence act under an implied authorisation<sup>1</sup>.

paisible et les troupes de la ligne, et les habitants qui prenaient part aux hostilités sans faire partie de l'armée régulière, étaient traités comme des révoltés.'

A proclamation issued by the commanders of the Russo-Austrian army in the Lower Valais in 1799 is of little interest with reference to the present point, because the invaders may have looked upon the population of the Lower Valais as being in insurrection against the suzerainty of the Upper Valais; but it is sufficiently atrocious and curious to be worth quoting on its own account. The generals order 'le peuple du bas Valais par la présente de poser les armes sans aucun délai,' and declare that 'si au mépris de notre proclamation . . . quelques uns d'entre vous sont trouvés les armes à la main, nous vous annonçons qu'ils seront sans grace passés au fil de l'épée, leurs avoirs confisqués, et leurs femmes et enfants même ne seront pas épargnés pour servir d'exemple à tous les mutins. C'est, pourquoi, chrétiens frères, rentrez en vous mêmes, tournez enfin vos armes contre vos véritables ennemis, qui vous trompent en se disant vos amis; songez que votre dernière heure a sonné et qu'il dépend encore dans cet instant de vous choisir votre parti.' Koch, Mém. de Massena, Pièces justificatives, iii. 475.

<sup>1</sup> De Martens, Précis, § 271; Wheaton, Elem. pt. iv. ch. ii. § 9; Klüber, § 267.

Statements of this kind, made after the question of the permissibility of the employment of subjects otherwise than as regular soldiers had been brought forcibly to the attention of the world, have greater weight than those of earlier writers. For a long time it was not necessary for any state to declare itself on the subject. In 1863 however it fell to the lot of the United States to do so. In that year the 'Instructions for the Government of Armies in the Field' were issued, and the 51st article says that 'if the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorised levy, *en masse* to resist the invader, they are now treated as public enemies, and if captured, are prisoners of war.' In 1870 the Germans acted in a harsher spirit. Notwithstanding that a law was passed by the French Assembly in August of that year under which 'citizens rising spontaneously in defence of the territory' were 'considered to form part of the national guard,' provided that they were distinguished by one at least of the distinctive signs of that corps, the Prussian government required that 'every prisoner, in order to be treated as a prisoner of war, shall prove that he is a French soldier by showing that he has been called out and borne on the lists of a militarily organised corps, by an order emanating from the legal authority and addressed to him personally<sup>1</sup>.' This requirement, though far less stringent than the demands made in the eighteenth century, has failed to commend itself to the minds of jurists<sup>2</sup>; and the proceedings of the Brussels

<sup>1</sup> Art. ii. of the French law mentioned provided that 'sont considérés comme faisant partie de la garde nationale les citoyens qui se portent spontanément à la défense du territoire avec l'arme dont ils peuvent disposer, et en prenant un des signes distinctifs de cette garde qui les couvre de la garantie reconnue aux corps militaires constitués.' Calvo, § 838. Proclamation of the General commanding-in-chief transcribed from the German *Recueil Officiel*, published at Versailles, in Delerot, *Versailles pendant l'Occupation*, 104. Part of a similar proclamation is quoted by Bluntschli, § 570, bis.

<sup>2</sup> Calvo, § 838; Heffter (ed. 1873), § 124 and 124<sup>a</sup>; Rolin Jacquemyns, *La Guerre Actuelle*, p. 26. The majority of the members of the Institute of Inter-

PART III. Conference give reason to hope that the conduct of the  
CHAP. VII.

Prussian commanders may remain without imitators. The ninth article of the draft Declaration, as adopted, lays down only that corps of volunteers shall 'have at their head a person responsible for his subordinates,' and the tenth article declares that 'the population of a territory, not occupied, which spontaneously takes up arms at the approach of an enemy in order to combat the invading force, without having had time to organise itself conformably' to certain other requirements of the preceding article, shall be considered as 'belligerent if it respects the laws and customs of war.' If the rules of war were settled in conformity with these proposals, which were approved of by the larger military powers, and to which objection was made by the delegates of the smaller states on the ground only that enough scope was not left by them for spontaneous effort, the doctrine of state authorisation would for all practical purposes disappear. In some cases a rising would be permitted without authorisation, whether express or implied; in all it would be implied if a responsible person, not necessarily a soldier, were found at the head of a body of men possessing certain of the external marks characteristic of regular forces. That the law should be settled in this sense is eminently to be wished. The requirement of a state authorisation is generally superfluous. It offers no guarantee for the observance of the usages of war that is not better given by other rules, which are in most cases necessary, and to the enforcement of which there is no objection. In the few cases where the requirement of authorisation would work independently it may be questioned whether its effect would not be distinctly bad. History does not suggest that sudden uprisings of a population in face of an advancing enemy will often occur; but when they do take place, the depth of the patriotic sentiment which must have inspired them, and their

national Law present at the Hague in 1875, by expressing their approval of the Russian project of a declaration upon the laws and customs of war as modified by the Brussels Conference, condemned the conduct of the Germans.

helplessness against an organised force, call rather for treatment of unusual leniency than for exceptional severity. PART III.  
CHAP. VII.

§ 179. The characteristics of regular soldiers which armed forces are required by belligerents to possess as the condition of being recognised as legitimate combatants, may be said to be, either together or separately, according to the circumstances of the case,— Whether the possession of some of the external characteristics of regular soldiers is required.

1. The fact of acting in more or less organised bodies of considerable size.
2. The existence of a responsible chief.
3. The possession of a uniform, or of permanent distinguishing marks on the dress.

With these conditions, as with authorisation, the tendency of usage has of late been towards relaxation. According to De Martens<sup>1</sup>, it was scarcely allowed in the eighteenth century that a militia force could claim the privileges of regular troops, although in its nature it is a permanently organised body and consequently rather more than satisfied the two first of the three requirements. There are certainly some cases which go as far as this. In 1742 the Austrians excluded the Bavarian militia from belligerent rights; and the capitulation of Quebec in 1759, by providing that the inhabitants who had borne arms should not be molested, on the ground that 'it is customary for the inhabitants of the colonies of both crowns to serve as militia,' suggests that, apart from the special custom, they would have been left to the mercy of the English general<sup>2</sup>. The root of this indisposition to admit militia to be legitimate combatants was rather in military pride than in any doubt as to the sufficiency of the guarantees which they presented. Through prejudice inherited from feudal times and the era of mercenaries, soldiers thought a militia unworthy to share in privileges which

<sup>1</sup> Précis, § 271.

<sup>2</sup> Moser, Versuch, ix. i. 268; Ann. Regist. for 1759, p. 247. By the capitulation of the French troops in Canada in the ensuing year it is agreed that the militia 'shall not be molested on account of their having carried arms.' Ann. Regist. for 1760, p. 222.

PART III. were looked upon as the sign of the honourable character of  
 CHAP. VII.  
 — the military calling, because its members were neither soldiers

Imperfect-  
 ly organ-  
 ised levies  
 permissible  
 in prin-  
 ciple.

by profession, nor able to share in the larger operations of war which were the peculiar business of the latter. The same causes which shook the doctrine of the necessity of express authority during the revolutionary and Napoleonic wars could not but be fatal to a distinction founded on no more solid a basis than this; and accordingly from that time no doubt has been entertained as to the legitimacy in principle of militia and other imperfectly organised levies. Such questions as exist refer solely to the quantity and relative value of the marks by which the legal position of a force, not belonging to the army proper, can be ascertained.

Contro-  
 versy dur-  
 ing the  
 Franco-  
 German  
 war of  
 1870.

Much attention was directed to the subject during the Franco-German war of 1870-1; and the occurrences which then happened, together with the discussions which took place at the Conference of Brussels, render it possible to come to a fair conclusion as to the characteristics which ought now to be accepted as entitling a force to be recognised as belligerent. In the course of the war bodies of irregulars called *Francs Tireurs* were formed in France, who acted independently, without a military officer at their head, and who were distinguished in respect of dress only by a blue blouse, a badge, and sometimes a cap. The Germans refused to consider them legitimate belligerents on the double ground that they were not embodied as part of the regular forces of the state, viz. as part of the army or of the *Garde Mobile*, and that the distinguishing marks on the dress were insufficient or removable. The blouse, it was said, was the common dress of the population, and the badge and cap could be taken off and hidden at will. It was demanded that the marks should be irremovable and distinguishable at rifle distance. Where bodies of men are small, are acting independently, and especially if they are not under the immediate orders either of a military officer or of a local notability, such as a mayor in certain countries, an administrative official



of sufficient rank, or a landed proprietor of position, they depend solely upon their dress marks for their right to belligerent privileges, since it is solely through them that the enemy can ascertain their quality. It is clear therefore that such marks must be irremovable; but to ask for marks distinguishable at a long distance is to ask not only for a complete uniform, but for a conspicuous one. The essential points are that a man shall not be able to sink into the class of non-combatants at his convenience, and that when taken prisoner there shall be no doubt on the patent facts how he ought to be dealt with. For both these purposes irremovable marks, clearly distinguishable at a short distance, are amply sufficient. The question whether irregular levies must be under the general military command, whether in fact, as a matter not of authorisation but of the sufficiency of the guarantees which it can offer for proper behaviour, a population has the right of spontaneous action in a moment of opportunity or emergency, was discussed at the Conference of Brussels. In the original draft Project of Convention it was made a condition of the possession of combatant rights that the persons claiming to have them should be under such command, and the representative of Germany showed a strong desire to maintain the requirement. After a good deal of discussion however the paragraph containing the condition was modified, and though the powers represented at Brussels are not legally bound by the terms of the draft Declaration as ultimately settled, it would be difficult for the great military states to ignore the admissions made on their behalf, and to refuse to acknowledge bodies of men headed by any responsible person as being combatant, irrespectively of connection with the general military command, provided that, as a body, they conform to the rules of war, and that if in small numbers they are distinguishable by sufficient marks. If in large numbers the case is different. Large bodies, which do not possess the full marks of a militia, must belong to one of two categories. They must either form part of the permanent

PART III.  
CHAP. VII.

Brussels  
Confer-  
ence.

Require-  
ments  
which may  
reasonably  
be exacted  
from

1. men act-  
ing in small  
bodies,  
2. men act-  
ing in large  
bodies.



PART III. forces of a state, which from poverty or some other reason  
 CHAP. VII. is unable to place them in the field properly uniformed, or perhaps officered, as in the instance of the Norwegian Land-sturm, to which attention was directed at Brussels by the Swedish representative<sup>1</sup>; or else they must consist in a part of the unorganised population rising in arms spontaneously or otherwise in face of the invader. In neither case are dress marks required. In the first the dependence on military command is immediate, and affords sufficient guarantees. In the second, dress marks are from the nature of the case impossible; and to insist upon them would be to nullify the concession which, as was seen in the last section, the military powers are ready to make, if the conclusions arrived at in the Brussels Conference can be taken to any degree as indicating their views. Dress marks in the particular case are besides unnecessary. The fact that a large body is operating together sufficiently separates it as a mass from the non-combatant classes, and there can be no difficulty in supplying the individual members with certificates which would prove their combatant quality when captured singly or in small detachments. The possession of belligerent privilege in such cases hinges upon subordination to a responsible person, who by his local prominence, coupled with the fact that he is obeyed by a large force, shows that he can cause the laws of war to

<sup>1</sup> The case of the Ordenanza in Portugal was similar. It was an organised but ununiformed militia, which during the advance of Massena in 1810 was used by Lord Wellington to harass the communications of the French army. Massena issued an order that all who might be captured should be shot, on which the English general addressed a letter to the former stating that 'ce que vous appelez "des paysans sans uniforme," "des assassins et des voleurs de grand chemin," sont l'Ordenanza du pays, qui comme j'ai déjà eu l'honneur de vous assurer sont des corps militaires commandés par des officiers, payés, et agissant sous les lois militaires. Il paraît que vous exigez que ceux que jouiront des droits de la guerre soient revêtus d'un uniforme; mais vous devez vous souvenir que vous même avez augmenté la gloire de l'armée Française en commandant des soldats qui n'avaient pas d'uniforme.' Wellington Despatches, vi. 464. 'La leçon que Massena reçut à cette occasion du général anglais ne saurait être trop connue,' remarks Lanfrey, Hist. de Nap. i. v. 386.

be observed, and that he can punish isolated infractions of them if necessary<sup>1</sup>. PART III.  
CHAP. VII.

§ 180. Hostilities at sea are in the main carried on by the regular navy of the state, which corresponds with the regular military forces employed on land. Maritime  
hostilities.

Until lately all maritime states have also been in the habit of using privateers, which are vessels belonging to private owners, and sailing under a commission of war empowering the person to whom it is granted to carry on all forms of hostility which are permissible at sea by the usages of war. Before giving a privateering commission, it is usual for the government issuing it to require the lodgment of caution money or the execution of a bond by way of security against illegal conduct on the part of the holder, and against a breach of the instructions which are issued for his guidance. The commission is revocable on proof of its misuse being produced, and by the English law at least the owners of the vessel were liable in damages; it was also usual for the Lords of the Admiralty to institute proceedings in the Admiralty Court upon complaint of ill-conduct. As a further safeguard, a privateer is liable to visit by public vessels of war; and as she is not invested with a public character, neutral ships of war are permitted to verify the lawfulness of the commission under which she sails by requiring its production. Privateers.

Universally as privateers were formerly employed, the right to use them has now almost disappeared from the world. It formed part of the Declaration adopted at the Congress of Paris in 1856 with reference to Maritime Law that 'privateering is and remains abolished;' and all civilised states have since become signatories of the Declaration, except the United States, Spain, and Mexico. For the future privateers

<sup>1</sup> D'Angeberg, Nos. 375, 854; Parl. Papers, Miscell., No. i. 1875, 80, 122, 140; arts. 9 and 45 of the Project of Convention, and arts. 9 and 10 of the Project of Declaration of Brussels. See also American Instruct. § 49, 51-52; and the French Manuel de Droit Int. à l'Usage &c., 30.

M. Rolin Jacquemyns (*La Guerre Actuelle* and *Second Essai sur la Guerre Franco-Allemande*) and Mr. Droop (Papers read before the Juridical Soc. vol. iii. pt. xxi.) have examined the questions treated of in the above section.

PART III. can only be employed by signatories of the Declaration of  
 CHAP. VII. Paris during war with one of the last-mentioned states<sup>1</sup>.

Volunteer  
 navy.

§ 181. A measure taken by Prussia during the Franco-German war of 1870 opens a rather delicate question as to the scope of the engagement not to employ privateers by which the signatories of the Declaration of Paris are bound. In August of that year the creation of a volunteer navy was ordered by decree. The owners of vessels were invited to fit them out for attack on French ships of war, and large premiums for the destruction of any of the latter were offered. The crews of vessels belonging to the volunteer navy were to be under naval discipline, but they were to be furnished by the owners of the ships; the officers were to be merchant seamen, wearing the same uniform as naval officers, and provided with temporary commissions, but not forming part of, or attached to, the navy in any way, though capable of receiving a commission in it as a reward for exceptional services. The French government protested against the employment of private vessels in this manner as an evasion of the Declaration of Paris, and addressed a despatch on the subject to the government of England. The matter was laid before the law officers of the Crown, and they reported that there were substantial differences between a volunteer navy as proposed by the Prussian government and the privateers which it was the object of the Declaration to suppress. Lord Granville in consequence declared himself unable to make any objection to the intended measure on the ground of its being a violation of the engagement into which Prussia had entered. Nevertheless it hardly seems to be clear that the differences, even though substantial, between privateers and a volunteer navy organised in the above manner are of a kind to prevent the two from being identical in all important respects. In both the armament is fitted out by persons whose motive is wish for gain, in both the crews and officers are employed by them and work therefore primarily rather in their interests

<sup>1</sup> Hertalet, No. 271.

than in those of the nation. The difference that in the particular case of the Prussian volunteer navy attacks upon men of war were alone contemplated was accidental and would have been temporary. At the beginning of the war Prussia announced her intention not to capture private property at sea in the hope of forcing France to spare the commerce which she was herself unable to protect. If the war had been continued for any length of time after January 1871, when this announcement was withdrawn, and if a volunteer navy had in fact been formed, it would of course have been authorised to capture private property; and there is no reason to suppose that any state acting upon the custom of seizing private property would make a distinction between public and private vessels in the powers given to its volunteer navy. The sole real difference between privateers and a volunteer navy is then that the latter is under naval discipline, and it is not evident why privateers should not also be subjected to it<sup>1</sup>. It cannot be supposed that the Declaration of Paris was merely intended to put down the use of privateers governed by the precise regulations customary up to that time. Privateering was abandoned because it was thought that no armaments maintained at private cost, with the object of private gain, and often necessarily for a long time together beyond the reach of the regular naval forces of the state, could be kept under proper control. Whether this belief was well founded or not is another matter. It may be that the organisation intended to be given to the Prussian volunteer navy, or some analogous organisation, would possess sufficient safeguards. If so there could be no objection on moral grounds to its use; but unless a volunteer navy were brought into closer connection with the state than seems to have been the case in the Prussian project it would be

<sup>1</sup> M. Bluntschli (§ 670) makes the fact that the Prussian volunteer navy was to be under general naval command a point of distinction from privateers. But, as he properly says in an earlier part of the same section, 'le corsaire reconnaissait l'autorité de l'amiral commandant la flotte.' Was the dependence intended to be closer in the one case than it has been in the other?

PART III. difficult to show that its establishment did not constitute an  
 CHAP. VII. evasion of the Declaration of Paris<sup>1</sup>.

The incorporation of a part of the merchant marine of a country in its regular navy is of course to be distinguished from such a measure as that above discussed.

Right of  
non-com-  
missioned  
vessels to  
resist cap-  
ture.

§ 182. Non-commissioned vessels have a right to resist when summoned to surrender to public ships or privateers of the enemy. The crews therefore which make such resistance have belligerent privileges; and it is a natural consequence of the legitimacy of their acts that if they succeed in capturing their assailant the capture is a good one for the purpose of changing the ownership of the property taken and of making the enemy prisoners of war<sup>2</sup>.

Attack by  
non-com-  
missioned  
ships ille-  
gitimate.

§ 183. By some writers it is asserted that a non-commissioned ship has also a right to attack<sup>3</sup>. If there was ever anything to be said for this view, and the weight of practice and of legal authority was always against it<sup>4</sup>, there can be no question that it is too much opposed to the whole bent of modern ideas to be now open to argument. There is no such reason at sea as there is on land for permitting ill-regulated or unregulated action. On the common ground of the ocean a man is not goaded to leave the non-combatant class, if he naturally belongs to it, by the peril of his country or his home. Every one's right to be there being moreover equal, the initiative in acts of hostility must always be aggressive; and on land irregular levies only rise for defence, and are only permissible for that purpose. It is scarcely necessary to add that non-commissioned ships offer no security that hostilities will be carried on by them in a legitimate

<sup>1</sup> D'Angeberg, Nos. 352 and 362; Bluntschli, § 670; Calvo, § 944.

<sup>2</sup> Kent, i. 94; Halleck, ii. 12; Mr. Justice Story in *Brown v. The United States*, viii Cranch, 135.

<sup>3</sup> Wheaton, pt. iv. ch. ii. § 9. Kent (i. 96) thinks that persons depredating without the leave of their state expressed in a commission commits a municipal wrong, but that 'as respects the enemy they violate no rights by capture.'

<sup>4</sup> Vattel, liv. iii. ch. xv. § 226; De Martens, Précis, § 289; Queen's Naval Regulations, 1861.

manner. Efficient control at sea must always be more difficult than on land; and if it was found that the exercise of due restraint upon privateers was impossible, *à fortiori* it would be impossible to prevent excesses from being indulged in by non-commissioned captors.

§ 184. In a general sense a belligerent has a right to use all kinds of violence against the person and property of his enemy which may be necessary to bring the latter to terms. *Primâ facie* therefore all forms of violence are permissible. But the qualification that the violence used shall be necessary violence has received a specific meaning; so that acts not only cease to be permitted so soon as it is shown that they are wanton, but when they are grossly disproportioned to the object to be attained; and the sense that certain classes of acts are of this character has led to the establishment of certain prohibitory usages.

General limitation upon the rights of violence.

These prohibitory usages limit the right of violence in respect of

1. The means of destruction which may be employed.
2. The conditions under which a country may be devastated.
3. The use of deceit.

Some questions not falling under either of these heads have to be determined by reference to the general limitation forbidding wanton or disproportionate violence.

§ 185. The first of the above prohibitory usages may be described as the rough result of a compromise between a dislike to cause needless suffering and a wish to use the most efficient engines of war. On the whole it may be said generally that weapons are illegitimate which render death inevitable or inflict distinctly more suffering than others, without proportionately crippling the enemy. Thus poisoned arms have long been forbidden, and guns must not be loaded with nails or bits of iron of irregular shape. To these customary prohibitions the European powers, except Spain, have added as between themselves the abandonment of the right

Specific usages with respect to,

1. the means of destruction which may be employed;

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PART III. to use explosive projectiles weighing less than fourteen  
 CHAP. VII. ounces; and in the Declaration of St. Petersburg, by which the renunciation of the right was effected in 1868, they took occasion to lay down that the object of the use of weapons in war is 'to disable the greatest possible number of men, that this object would be exceeded by the employment of arms which needlessly aggravate the sufferings of disabled men, or render their death inevitable, and that the employment of such arms would therefore be contrary to the laws of humanity<sup>1</sup>.' On the other hand, the amount of destruction or of suffering which may be caused is immaterial if the result obtained is conceived to be proportionate. Thus no objection has ever been made to mines; it is not thought improper to ram a vessel so as to sink her with all on board; and torpedoes have been received without protest among the modern engines of war.

2. Devastation.

§ 186. Devastation is capable of being regarded independently as one of the permitted kinds of violence used in order to bring an enemy to terms, or as incidental to certain military operations, and permissible only for the purpose of carrying them out. Formerly it presented itself in the first of these aspects. Grotius held that 'devastation is to be tolerated which reduces an enemy in a short time to beg for peace,' and in the practice of his time it was constantly used independently of any immediate military advantage accruing from it<sup>2</sup>. But during the seventeenth century opinion seems to have struggled, not altogether in vain, to prevent its being so used in more than a certain degree; and though the devastation of Belgium in 1683 and of Piedmont in 1693 do not appear to have excited reprobation, Louis XIV was driven

<sup>1</sup> De Martens, *Nouv. Rec. Gén.* xviii. 474, or Hertslet, No. 414; Vattel, liv. iii. § 156; Ortolan, liv. iii. ch. i; Bluntschli, § 557-8. Klüber (§ 244) pretends that the use of chain-shot is forbidden. Heffter (§ 124) and Bluntschli (§ 560) transform into a prohibition of red-hot shot the remarks of Klüber and De Martens (§ 273 note) that its use has been renounced by agreement in several naval wars, and that doubts have been expressed as to whether it can be legitimately employed.

<sup>2</sup> De Jure Belli et Pacis, lib. iii. c. xii. § 1.

to justify the more savage destruction of the Palatinate by alleging its necessity as a defensive measure for the protection of his frontiers. In the eighteenth century the alliance of devastation with strategical objects became more close. It was either employed to deny the use of a tract of country to the enemy by rendering subsistence difficult, as when the Duke of Marlborough wasted the neighbourhood of Munich in 1704, and the Prussians devastated part of Bohemia in 1757; or it was an essential part of a military operation, as when the Duc de Vendôme cut the dykes and laid the country under water from the neighbourhood of Ostend to Ghent, while endeavouring to sever the communications with the former place of the English engaged in the siege of Lille<sup>1</sup>. At the same time devastation was still theoretically regarded as an independent means of attack. Wolff declares it to be lawful both as a punishment, and as lessening the strength of an enemy; Vattel not only allows a country to be 'rendered uninhabitable, that it may serve as a barrier against forces which cannot otherwise be arrested,' but treats devastation as a proper mode of chastising a barbarous people; and Moser in like manner permits it both in order to 'deprive an enemy of subsistence which a territory affords to him,' and 'to constrain him to make peace<sup>2</sup>.' But every few years an advance in opinion is apparent. De Martens restricts further the occasions upon which recourse can be had to devastation. Property he says may be destroyed which cannot be spared without prejudicing military operations, and a country may be ravaged in extraordinary cases either to deprive an enemy of subsistence or to compel him to issue from his positions in order to protect his territory<sup>3</sup>. Even at the beginning of this century instances of devastation of a not necessary kind occasionally present themselves. In 1801 the enlargement of Lake Mareotis by the English during the siege of Alexandria was no doubt justified by the

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<sup>1</sup> Marlborough's Despatches, i. 378 and iv. 269; Moser, Versuch, ix. i. 122.

<sup>2</sup> Wolff, Jus Gentium, § 823; Vattel, liv. iii. c. ix. § 167; Moser, Versuch, ix. i. 121.

<sup>3</sup> Précis, § 280.



PART III. bare law as it was then understood ; but the measure, though  
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 — of great advantage to the besiegers, was not the sole condition of success. The destruction of the town of Newark by the American troops during their retreat from Canada in 1813 and of the public buildings of Washington by the English in 1814 may be classed together as wholly unnecessary and discreditable. The latter case was warmly animadverted upon by Sir J. Mackintosh in the House of Commons ; and since that time not only have no instances occurred, save by indulgence in an exceptional practice to be mentioned presently, but opinion has decisively laid down that, except to the extent of that practice, the measure of permissible devastation is to be found in the strict necessities of war<sup>1</sup>.

When devastation is permissible.

The right being thus narrowed, it is easy to distinguish between three groups of cases, in one of which devastation is always permitted, while in a second it is always forbidden, and in a third it is permitted under certain circumstances. To the first group belong those cases in which destruction is a necessary concomitant of ordinary military action, as when houses are razed or trees cut down to strengthen a defensive position, when the suburbs of a fortified town are demolished to facilitate the attack or defence of the place, or when a village is fired to cover the retreat of an army. Destruction, on the other hand, is always illegitimate when no military end is served, as is the case when churches or public buildings, not militarily used and so situated or marked that they can be distinguished, are subjected to bombardment in common with the houses of a besieged town. Finally, all devastation is permissible when really necessary for the preservation of the force committing it from destruction or surrender ; it would even be impossible to deny to an invader the right to cut the dykes of Holland to save himself from such a fate ; but when, as in the case supposed, the devastation is

<sup>1</sup> Wilson's Hist. of the British Expedition to Egypt, ii. 65 ; Ann. Regist. for 1814, p. 145 and 177 ; Hansard, xxx. 527 ; Manning, ch. v ; Heffter, § 125 ; Twiss, War, § 65 ; Bluntschli, § 663 ; Calvo, § 893.

extensive in scale and lasting in effect, modern opinion would demand that the necessity should be extreme and patent<sup>1</sup>.

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The exceptional practice of which mention has been made consists in the bombardment, during the siege of a fortified town, of the houses of the town itself in order to put an indirect pressure on the commandant inducing him to surrender on account of the misery suffered by the inhabitants. The measure is one of peculiar cruelty, and is not only unnecessary, but more often than not is unsuccessful. It cannot be excused; and can only be accounted for as a survival from the practices which were formerly regarded as permissible and which to a certain extent lasted, as has been seen, till the beginning of the present century. For the present however it is sanctioned by usage; and it was largely resorted to during the Franco-German war of 1870.

Bombard-  
ment of  
towns.

§ 187. As a general rule deceit is permitted against an enemy; and it is employed either to prepare the means of doing violent acts under favourable conditions, by misleading him before an attack, or to render attack unnecessary, by inducing him to surrender, or to come to terms, or to evacuate a place held by him. But under the customs of war it has been agreed that particular acts and signs shall have a specific meaning, in order that belligerents may carry on certain necessary intercourse; and it has been seen that persons and things associated with an army are sometimes exempted from liability to attack for special reasons. In these cases an understanding evidently exists that particular acts shall be done, or signs used, or characters assumed, for the appropriate purposes only; and it is consequently forbidden to employ them in deceiving an enemy. Thus information must not be surreptitiously obtained under the shelter of a flag of truce, and the bearer of a misused flag may be treated by the enemy as a spy; buildings not used as hospitals must not be marked with a hospital flag; and persons not covered

3. Deceit.

<sup>1</sup> It is scarcely necessary to point out that the above restrictions upon devastation apply only to devastation of an enemy's country.

PART III. by the provisions of the Geneva Convention must not be  
 CHAP. VII. protected by its cross<sup>1</sup>.

A curious arbitrary rule affects one class of stratagems by forbidding certain permitted means of deception from the moment at which they cease to deceive. It is perfectly legitimate to use the distinctive emblems of an enemy in order to escape from him or to draw his forces into action; but it is held that soldiers clothed in the uniforms of their enemy must put on a conspicuous mark by which they can be recognised before attacking, and that a vessel using the enemy's flag must hoist its own flag before firing with shot or shell. The rule, disobedience to which is considered to

<sup>1</sup> Vattel, liv. iii. § 177-8; Halleck, ii. 25; Bluntschli, § 565; Amer. Instruct. § 101, 114, 187; Project of Declaration of Brussels, art. 13.

Occasionally stratagems are criticised upon grounds which imply some confusion of mind. In the year 1800 an English squadron is said to have seized a Swedish galliot on the high seas near Barcelona, and put a force of soldiers and marines on board, which under cover of the apparent innocence of the vessel was able to surprise and mainly contribute to the capture of two Spanish frigates lying in the roads. As is very frequently the case with occurrences which are made the subject of animadversion against England in foreign works on international law, owing to a too common neglect to compare the English with the foreign sources of information, the true facts were wholly different to those alleged. No ruse was employed, and the Swedish vessel had nothing to do with the attack (James's Naval Hist. iii. 50). Assuming the facts however to be correctly stated by M. Ortolan (Dip. de la Mer, liv. iii. ch. i), it would be interesting to know how he and M. Calvo (§ 935) could separate the case from that of a vessel flying, as she is confessedly at liberty to do, false colours until the moment before firing her first gun. It is not pretended that the Swedish galliot was laid alongside the frigates and that the boarding was effected from her, nor that a single shot was fired from her; yet the English are accused of 'treason towards the enemy.' It seems pretty clear that the writers quoted must have allowed themselves to be influenced by the fact that the vessel was really Swedish, although the impression produced upon the minds of the Spanish commanders was entirely independent of this circumstance. However distinctly Swedish the galliot may have been in build and rig, she might have become British property by condemnation for carriage of contraband or breach of blockade. She would then have been an English ship using the legitimate ruse of flying the Swedish flag, and the Spaniards had no means of knowing that this was not actually the case. MM. Ortolan and Calvo point out rightly, on the assumed facts, that a gross breach of neutrality was committed; but as between the two enemies, the breach of neutrality would have had no bearing on the character of the acts done, and the deception effected would have been of a perfectly legitimate kind.

entail grave dishonour, has been based on the statement that **PART III.**  
 'in actual battle, enemies are bound to combat loyally and are **CHAP. VII.**  
 not free to ensure victory by putting on a mask of friendship.'  
 In war upon land victory might be so ensured, and the rule  
 is consequently sensible; but at sea, and the prohibition is  
 spoken of generally with reference to maritime war, the mask  
 of friendship no longer misleads when once fighting begins, and  
 it is not easy to see why it is more disloyal to wear a disguise  
 when it is obviously useless, than when it serves its purpose<sup>1</sup>.

§ 188. A spy is a person who penetrates secretly, or in **Spies.**  
 disguise or under false pretences, within the lines of an  
 enemy for the purpose of obtaining military information for  
 the use of the army employing him. Some one of the  
 above indications of intention being necessary to show the  
 character of a spy, no one can be treated as such who is  
 clothed in uniform, who whether in uniform or not has  
 accidentally strayed within the enemy's lines while carrying  
 despatches or messages, or who merely endeavours to traverse  
 those lines for the purpose of communicating with a force  
 beyond or of entering a fortress.

It is legitimate to employ spies; but to be a spy is  
 regarded as dishonourable, the methods of obtaining in-  
 formation which are used being often such that an honourable  
 man cannot employ them. A spy, if caught by the enemy,  
 is punishable after trial by court-martial with the ignominious  
 death of hanging; though, as M. Bluntschli properly remarks,  
 it is only in the more dangerous cases that the right of  
 inflicting death should be acted upon, the penalty being in  
 general out of all proportion with the crime<sup>2</sup>.

Together with spies, as noxious persons whom it is per-

<sup>1</sup> Ortolan, liv. iii. ch. i; Pistoye et Duverdy, i. 231-4; Bluntschli, § 565.  
 Lord Stowell (*The Peacock*, iv Rob. 187) in stating the rule gives a different  
 reason for it to that mentioned above, but it is one that is not applicable to  
 all cases.

<sup>2</sup> Bluntschli, § 628-32, 639; United States Instructions &c., arts. 88, 99,  
 100; *Projet d'une Declaration &c.*, arts. 19 and 22; *Manuel de Droit Int. à*  
*l'Usage des Off. de l'Armée de Terre*, p. 32.

PART III. mitted to execute, but differing from them in not being  
 CHAP. VII. tainted with dishonour, and so in not being exposed to an  
 ignominious death, are bearers of despatches or of verbal  
 messages, when found within the enemy's lines, if they  
 travel secretly or, when soldiers, without uniform, and persons  
 employed in negotiating with commanders or political  
 leaders intending to abandon or betray the country or  
 party to which they belong.

Persons in  
 balloons.

A strong inclination was shown by the Germans during the war of 1870 to treat as spies persons passing over the German lines in balloons. 'All persons,' says Colonel Walker in writing to Lord Granville, 'who attempt to pass the Prussian outposts without permission, whether by land, water or air,' were 'deported to Prussia under suspicion of being French spies;' and it was declared by Count Bismarck, in writing of an English subject captured in a balloon, that apart from the fact that he was suspected to be the bearer of illicit correspondence, his arrest and trial by court-martial 'would have been justified, because he had spied out and crossed our outposts and positions in a manner which was beyond the control of the outposts, possibly with a view to make use of the information thus gained, to our prejudice.' Neither secrecy, nor disguise, nor pretence being possible to persons travelling in balloons, the view taken by the Germans is inexplicable; and it is satisfactory to notice that the treatment of balloon travellers as spies was forbidden in the proposed Declaration of Brussels, and that their right to be treated as prisoners of war is affirmed in the French official manual for the use of military officers<sup>1</sup>.

A person punishable as a spy, or subject to penalties for the other reasons mentioned above, cannot be tried and punished or subjected to such penalties if after doing the punishable act he has rejoined the army by which he is employed before his arrest is effected.

<sup>1</sup> Parl. Papers, 1871, lxxii; *Projet d'une Declaration &c.*, art. 22; *Manuel à l'Usage &c.*, p. 40.

## CHAPTER VIII.

### NON-HOSTILE RELATIONS OF BELLIGERENTS.

§ 189. Under the modern customs of war belligerents are brought from time to time into non-hostile or quasi-amicable relations with each other, which impose obligations, and for the due establishment of which certain formalities are required. These relations sometimes consist in a temporary cessation of hostility towards particular individuals, who are protected by flags of truce, passports, safe-conducts, or licences; or towards the whole or part of the armed forces of the enemy under suspension of arms, truces, or armistices; and sometimes in the partial abandonment of the rights of hostility under cartels and agreements for capitulation. As hostility ceases in so far as these relations are set up, the arrangements which are made under them proceed upon the understanding that they will be carried out with the same good faith which one nation has a right to demand from another in time of peace, and therefore both that no attempt will be made to use them as a cover for acts not contemplated by them, and that on the other hand the enemy will be given the full benefit of their expressed or implied intention.

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General  
character  
of non-  
hostile  
relations.

§ 190. A flag of truce is used when a belligerent wishes to enter into negotiations with his enemy. The person charged with the negotiation presents himself to the latter accompanied by a drummer or a bugler and a person bearing a white flag. As belligerents have the right to decline to enter into

Flags of  
truce.

PART III. negotiations they are not obliged to receive a flag of truce; but  
 CHAP. VIII. the persons bearing it are inviolable; they must not therefore be turned back by being fired upon, and any one who kills or wounds them intentionally is guilty of a serious infraction of the laws of war. If however they present themselves during the progress of an engagement, a belligerent is not obliged immediately to put a stop to his fire, the continuance of which may be of critical importance to him, and he cannot be held responsible if they are then accidentally killed. If the enemy receives persons under the protection of a flag of truce he engages by implication to suspend his war with respect to them for so long as the negotiation lasts; he cannot therefore make them prisoners, and must afford them the means of returning safely within their own lines; but a temporary detention is permissible if they are likely to be able to carry back information of importance to their army. Effectual precautions may always be taken to hinder the acquisition of such knowledge; bearers of flags of truce may for example be blindfolded, or be prevented from holding communication with other persons than those designated for the purpose of having intercourse with them.

It is a necessary consequence of the obligation to conduct the non-hostile intercourse of war with good faith, that a belligerent may not make use of a flag of truce in order to obtain military information; and though its bearer is not expected to refrain from reporting whatever he may learn without effort on his own part, any attempt to acquire knowledge surreptitiously exposes him to be treated as a spy. Deserters, whether bearing or in attendance upon a flag of truce, are not protected by it; they may be seized and executed, notice being given to the enemy of the reason of their execution<sup>1</sup>.

Passports. § 191. Passports are written permissions given by a belligerent to subjects of the enemy whom he allows to travel

<sup>1</sup> American Instruct. § 101-12; Calvo, § 974; Bluntschli, § 681-4; Halleck, ii. 361; Washington's Corresp. v. 341-2.

without special restrictions in the territory belonging to him or under his control. Safe-conducts are like permissions under which persons to whom they are granted may come to a particular place for a defined object. Passports, being general, must be given by the government or its duly appointed agents; safe-conducts may be conceded either by the government or by any officer in military or naval command in respect of places within his district, but in the latter case they may be rescinded by a higher authority; and both passports and safe-conducts may be annulled by the person who has given them, or by his superior, whenever owing to any change of circumstances their continued use has in his judgment become dangerous or inconvenient. When this is done, good faith obviously requires that the grantee who has placed himself in the grasp of his enemy under a promise of immunity shall be allowed to withdraw in safety; it is not necessary however that he shall be permitted to retire in a direction chosen by himself if he has a passport, or in that contemplated by his safe-conduct; his destination and his route may be fixed for him. Neither passports nor safe-conducts are transferable. When they are given for a certain time only, but from illness or other unavoidable cause the grantee is unable to withdraw from the hostile jurisdiction before the end of the specified term, protection must be extended to him for so long as is necessary; if, on the other hand, he voluntarily exceeds prescribed limits of time and place he forfeits the privileges which have been accorded to him, and he may be punished severely if it can be shown that he has taken advantage of the indulgence which he has received for improper objects<sup>1</sup>.

§ 192. Agreements for the temporary cessation of hostilities are called suspensions of arms when they are made for a

Suspensions of arms and armistices.

<sup>1</sup> Halleck, ii. 351; Calvo, § 957-60; Bluntschli, § 675-8. An Act of Congress passed in 1790 exposes any civilian violating a passport or safe-conduct to imprisonment for three years and a fine of indeterminate amount, and sends soldiers before a court-martial.



PART III. passing and merely military end and take effect for a short  
 CHAP. VIII. time or within a limited space ; and they are called truces or armistices when they are concluded for a longer term, especially if they extend to the whole or a considerable portion of the forces of the belligerents, or have an entirely or partially political object<sup>1</sup>.

As neither belligerent can be supposed in making such agreements to be willing to prejudice his own military position, it is implied in them that all things shall remain within the space and between the forces affected as nearly as possible in the condition in which they were at the moment when the compact was made, except in so far as causes may operate which are independent of the state of things brought about by the previous operations ; the effect of truces and like agreements is therefore not only to put a stop to all directly offensive acts, but to interdict all acts tending to strengthen a belligerent which his enemy apart from the agreement would have been in a position to hinder. Thus in a truce between the commander of a fortress and an investing army the besieger cannot continue his approaches or make fresh batteries, while the besieged cannot repair damages sustained in the attack, nor erect fresh works in places not beyond the reach of the enemy at the beginning of the truce, nor throw in succours by roads which the enemy at that time commanded ; and in a truce between armies in the field neither party can seize upon more advanced positions, nor put himself out of striking distance of his enemy by retreat, nor redistribute his corps to better strategical advantage. But in the former case the besieged may construct works in places hidden from or unattainable by his enemy, and the besieger may receive reinforcements and material of war ; and in the latter case magazines may be replenished

<sup>1</sup> It is hardly possible to draw a clear line of distinction between suspensions of arms, truces, and armistices, though in their more marked forms they are readily to be distinguished. See Vattel (liv. iii. ch. xvi. § 233), Halleck (ii. 342-7), Bluntschli (§ 688-9), and Calvo (§ 976).

and fresh troops may be brought up and may occupy any position access to which could not have been disputed during the progress of hostilities. During the continuance of a truce covering the whole forces of the respective states a belligerent may still do all acts, within such portion of his territory as is not the theatre of war, which he has a right to do independently of the truce; he may therefore levy troops, fit out vessels, and do everything necessary to increase his power of offence and defence <sup>1</sup>.

Whether the revictualling of a besieged place should be permitted as of course during the continuance of a truce is a question which stands somewhat apart. The introduction of provisions is usually mentioned by writers as being forbidden in the absence of special stipulations whenever the enemy might but for the truce have prevented their entrance; there can be no doubt that the same view would be taken by generals in command of a besieging army <sup>2</sup>; and as it is not in most cases possible to introduce trains of provisions in the face of an enemy, the act of doing so under the protection of a truce might at first sight seem to fall naturally among the class of acts prohibited for the reason that apart from the truce they could not be effected. It is however in reality

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Revictual-  
ling of a  
besieged  
place.

<sup>1</sup> The principle of the law regulating acts permitted during a truce was very early recognised; see Albericus Gentilis, *De Jure Belli*, lib. ii. c. 13. The modern doctrine on the subject is given by Halleck (ii. 345), Bluntschli (§ 691-2), Calvo (§ 979). The American Instructions for Armies in the Field (§ 143) regard it as an open question whether the garrison of a besieged town has a right to repair breaches and throw up new works, irrespectively of whether the enemy could have prevented them if hostilities had continued. Heffter however (§ 142) seems to be the only modern writer who is inclined to give this advantage to a garrison, and it is difficult to see what reasons could be alleged in its favour. Nevertheless to avoid possible disputes it may be worth while, in accordance with the direction given in the American Instructions, to make a special stipulation on the subject.

<sup>2</sup> Halleck, ii. 345; Wheaton, *Elem.* pt. iv. ch. ii. § 22; Calvo, § 980. The consideration that a belligerent may intend to reduce the besieged places by famine seems to weigh with the latter; but the essence of a truce is that all forms of hostile action are suspended, and the continuance of steps taken towards an ultimate reduction by famine is necessarily a continuance of hostile action.

PART III. separated from them by a very important difference. Pro-  
 CHAP. VIII. visions are an exhaustible weapon of defence, the consump-  
 — tion of which, unlike that of munitions of war, continues during a truce or armistice; the ultimate chances of successful resistance are lessened by every ration which is eaten, and to prohibit their renewal to the extent to which they are consumed is precisely equivalent to destroying a certain number of arms for each day that the armistice lasts. To forbid revictualment is therefore not to support but to infringe the principle that at the end of a truce the state of things shall be unchanged in those matters which an enemy can influence. Generally no doubt armistices contain special stipulations for the supply of food by the besieger, or securing the access of provisions obtained by the garrison or non-combatant population under the supervision of the enemy, who specifies the quantity which may from time to time be brought in<sup>1</sup>. The view consequently that revictual-ling is not a necessary accompaniment of a truce is rarely of practical importance; but as a belligerent cannot be expected to grant more favourable terms to his enemy than can be demanded in strict law, if he sees advantage in severity he will be tempted to refuse to allow provisions to be brought into an invested place, if he is strong enough to impose his will, whenever the starvation of the garrison and the inhabitants is likely to influence the determination of his adversary. A case in point is supplied by the refusal of Count Bismarck in November, 1870, to allow Paris to receive sufficient food for the subsistence of the population during an armistice of twenty-five days' duration which it was then proposed to

<sup>1</sup> By the Armistice of Treviso in 1801 Mantua was to be revictualled from ten days to ten days with a fixed amount of provisions for the garrison; the inhabitants were to be at liberty to bring in supplies for themselves, but the French army was to be free to take measures to prevent the quantity exceeding the daily consumption (De Martens, Rec. vii. 294); by that of Pleiswitz in 1813 the fortresses held by the French were to be revictualled every five days by the commanders of the investing troops. A commissary named by the commandant of each of the besieged places was to watch over the exactness of the supply (id. Nouv. Rec. i. 584).

conclude in order that an Assembly might be elected competent to decide upon the question of making peace<sup>1</sup>. There can be no question that a rule permitting revictualment from day to day, or at short intervals, under the supervision of the besieger, unless express stipulations to the contrary were made, would be better than that at present recognised. Besides being more equitable in itself, it would strengthen the hands of the besieged, or in other words the weaker party in negotiation.

When a truce affects a considerable area it is not always possible at once to acquaint the whole forces on both sides with the fact that it has been concluded; it is therefore usual to fix different dates for its commencement at different places, the period allowed to elapse before it comes into force at each place being proportioned to the length of time required for sending information. It sometimes happens in spite of this precaution when it is taken, and even when, a limited area being affected, the armistice begins everywhere at the same moment, that acts of hostility are done in ignorance of its having commenced. In such cases no responsibility is incurred by the belligerent who has unintentionally violated the truce on account of destruction of life or property, unless he has been remiss in conveying information to his subordinates; but prisoners and property which have been captured are restored, and partial truces or capitulations made

PART III.  
CHAP. VIII.

Truces  
which  
affect a  
large area.

<sup>1</sup> M. de Chaudordy in a circular addressed to the French diplomatic agents abroad thus expresses his view of the principle of law affecting the matter. While I do not think that the law is in conformity with his views, there can be no question that it ought to be so. 'Dans la langue du droit des gens, les termes ont une valeur qu'on ne peut pas dénaturer, et le principe d'un armistice accepté par M. de Bismarck implique nécessairement, quand il est question d'une place assiégée, le ravitaillement de cette place. Ce n'est pas là un objet de libre interprétation, mais bien une conséquence naturelle de l'expression même dont on s'est servi et que nous ne pouvons entendre dans un autre sens que celui qui est universellement adopté. Pour tous les peuples en effet, la condition du ravitaillement est implicitement contenue dans le principe de l'armistice, puisque chaque belligérant doit se trouver, à la fin de la suspension d'hostilités, dans l'état où il se trouvait au commencement.' D'Angeberg, Rec. No. 758.

PART III. by detached forces which are at variance with the terms of  
 CHAP. VIII. the wider agreement are annulled. Ignorance is considered to exist until the receipt of official notification; if therefore one of the belligerents at a given spot receives notification sooner than the other, and communicates his knowledge to his enemy, the latter is not bound to act upon the information which is presented to him, or before acting may require rigorous proof of its correctness <sup>1</sup>.

In the absence of special stipulations the general prohibition of commercial and personal intercourse which exists during war remains in force during an armistice.

Persons  
 competent  
 to conclude  
 truces.

All commanding officers may conclude suspensions of arms with a view to burying the dead, to have time for obtaining permission to surrender, or for a parley or conference; for longer periods and larger purposes officers in superior command have provisional competence within their own districts, but armistices concluded by them cease to have effect if not ratified by the supreme authority, so soon as notice of non-ratification is given to the enemy; agreements for an armistice binding the whole forces of a state are obviously state acts, the ordinary powers of a general or admiral in chief do not therefore extend to them, and they can only be made by the specially authorised agents of the government <sup>2</sup>.

Termination  
 of a  
 truce.

Truces and like agreements are sometimes made for an indefinite, but more commonly for a definite period. In the former case the agreement comes to an end on notice from

<sup>1</sup> Vattel, liv. iii. ch. xvi. § 239; Halleck, ii. 344; American Instructions, § 139; Bluntschli, § 690; Calvo, § 981.

The capitulation of Piacenza in 1800 is an instance of an agreement overridden by a wider compact. It was surrendered to the French on the same day as the convention was signed under which the Austrians were to retire behind the Mincio, giving over Piacenza to the French, but retiring the garrison. The Austrians claimed, as the surrender took place at three o'clock in the afternoon, and consequently after the signature of the convention, which took place at eight o'clock in the morning, that the capitulation should be considered null; and the French at once admitted the justice of the demand. *Corresp. de Nap.* i. vi. 365.

<sup>2</sup> Halleck, ii. 342; American Instructions, § 140; Calvo, § 977. See also Bluntschli, § 688.

one of the belligerents, which he is sometimes required to give at a stated time before the resumption of hostilities; in the latter case provision is sometimes made for notice to be given a certain number of days before the date fixed, and sometimes the truce expires without notice<sup>1</sup>. Disregard of the express or tacit conditions of a truce releases an enemy from the obligation to observe it, and justifies him in recommencing hostilities, without notice if the violation has clearly taken place by the order or with the consent of the state, or in case of doubt after a notice giving opportunity for the disavowal and punishment of the delinquent. Violation of the terms of a truce by private persons, acting on their own account, merely gives the right to demand their punishment, together with compensation for any losses which may have been suffered<sup>2</sup>.

§ 193. Cartels are a form of convention made in view of war or during its existence in order to regulate the mode in which such direct intercourse as may be permitted between the belligerent nations shall take place, or the degree and manner in which derogations from the extreme rights of hostility shall be carried out. They provide for postal and telegraphic communication, when such communication is allowed to continue, for the mode of reception of bearers of flags of truce, for the treatment of the wounded and prisoners of war, for exchange and the formalities attendant on it, and for other like matters. Whether postal or telegraphic communication is forbidden or allowed is a subject upon

<sup>1</sup> For examples see De Martens, Rec. vii. 76, 291, and Nouv. Rec. i. 583. An omission to state the hour at which hostilities are to recommence upon the terminal day, or an ambiguity in the indication of the day itself, might lead to serious consequences; it is therefore usual in modern armistices and truces to mark with precision the moment at which they are intended to expire. For opinions as to the manner in which lax phraseology should be construed, see Vattel, liv. iii. ch. xvi. § 244; Calvo, § 983.

<sup>2</sup> Vattel (liv. iii. ch. xvi. § 242) and Bluntschli (§ 695-6) give the right of recommencing hostilities without notice whenever a private person is not the delinquent. The proposed Declaration of Brussels would only have given the right to denounce the armistice even when an infraction by the state had clearly taken place.

PART III. which the belligerents decide purely in accordance with their  
 CHAP. VIII.

Cartel  
ships.

own convenience, and the principles and usages which govern the treatment of bearers of flags of truce and of wounded combatants and the exchange of prisoners have been already stated. Hence the only points which now require notice are any special practices with regard to details which may not have been mentioned, and such practices exist only in the case of vessels, called cartel ships, which are employed in the carriage by sea of exchanged prisoners. These are subjected to a few rules calculated to secure that they shall be used in good faith. A cartel ship sails under a safe-conduct given by an officer called a commissary of prisoners, who lives in the country of the enemy, and she is protected from capture or molestation, both when she has prisoners on board, and when she is upon a voyage to fetch prisoners of her own country or is returning after handing over those belonging to the enemy. This protection does not extend to a voyage undertaken from one port to another within the territory of the cartel ship for the purpose of taking prisoners on board at the latter place for conveyance to the hostile territory; and it is lost if she departs from the strict line of the special purpose for which she is used, or gives reason to suspect that she intends to do so. Thus she may not carry merchandise or passengers for hire, a fraudulent use must not be made of her to acquire information or to convey persons noxious to the enemy, and she must not be in a condition to exercise hostilities<sup>1</sup>.

Capitula-  
tions.

§ 194. A capitulation is an agreement under which a body of troops or a naval force surrenders upon conditions. The arrangement is a bargain made in the common interest of the contracting parties, of which one avoids the useless loss which is incurred in a hopeless struggle, while the other,

<sup>1</sup> Twiss, § 179; Calvo, § 963-5; The Daifje, iii Rob. 141-3; The Venua, ib. iv. 357-8. The privileges of cartel ships have been accorded to vessels sailing under an understanding with a commanding officer, even though unprovided with formal documents, when the *bona fides* of the employment has been clear. La Gloire, v Rob. 192.



besides also avoiding loss, is spared all further sacrifice of time and trouble and is enabled to use his troops for other purposes. Hence capitulations vary greatly in their conditions, according to the amount of the generosity shown by the victors, and more frequently according to the extent to which the power of the surrendering force to prolong resistance enables it to secure favourable terms. The force surrendering may become prisoners of war, certain indulgences only being promised to it or to the inhabitants of a place falling by its surrender into the hands of the victors; as when the right of being released upon parole is reserved to such officers as choose to receive their personal freedom, or when provision is made for the security of privileges of the inhabitants during the continuance of hostilities. Under more honourable forms of capitulation the garrison of a besieged fortress marches out with the honours of war, leaving the place and the warlike material contained in it in the hands of the enemy, but itself proceeding to the nearest posts of its own army; or a portion of territory and the magazines within it are yielded on condition of the force holding it being sent home with or without arms, and subject to or free from an engagement not to serve for the remainder of the war<sup>1</sup>.

In so far as capitulations are agreements of a strictly military kind, officers in superior or detached command are as a general rule competent to enter into them. But stipulations affecting the political constitution or administration of a country or place, or making engagements with respect to its future independence, cannot be consented to even by an officer commanding in chief without the possession of

PART III.  
CHAP. VIII.

Persons  
competent  
to conclude  
them.

<sup>1</sup> Wheaton, Elem. pt. iv. chap. ii. § 24; Halleck, ii. 348; Bluntschli, § 697-9. The capitulations of Sedan, which was the type to which most capitulations conformed during the war of 1870, and of Belfort, and the Convention of Cintra, may serve as examples of the different varieties mentioned in the text. See D'Angeberg, Nos. 392 and 1096; Wellington Despatches, iv. 127. For other specimens see Moser's Versuch, ix. ii. 160, 162, 176, 193, 206, 224; Washington's Correspondence, viii. 533.



PART III. special powers; and a subordinate commander cannot grant  
 CHAP. VIII. terms, without reference to superior authority, under which the enemy gains any advantage more solid than permission to surrender with forms of honour. In the one case it is evident that the functions belonging to officers commanding in chief in virtue of their employment are exceeded; in the other, as forces excluded from the control of the subordinate officer may be so placed when the agreement is arrived at, or may be intended so to move, as to render it unnecessary to give any better conditions than those least favourable to the enemy, the officer conceding advantageous terms necessarily oversteps the limits of his military competence. Capitulations therefore which include articles of such nature are void unless they are ratified by the state or commander-in-chief on the side of the officer accepting the surrender, and unless the party surrendering is willing on the arrival of the ratification to carry out his agreement.

Capitulation of El Arisch.

The capitulation of El Arisch in 1800 is an instance which illustrates the working of this rule. In December, 1799, General Kleber, who had been placed by Buonaparte at the head of the French army in Egypt, finding that he had no prospect of maintaining himself permanently in the country, made proposals for a capitulation to the Grand Vizier, who was advancing through Syria, and to Sir Sidney Smith, who acted upon the coast as commodore under the orders of Lord Keith, the admiral in command of the Mediterranean fleet. Sir Sidney Smith, believing that his government would be fully satisfied by any agreement under which the retirement of the French from Egypt was secured, consented that they should go to France, and be transported thither with their arms, baggage, and other property; and on the 24th January, 1800, he signed a convention to that effect. On the previous 17th December however, orders had been sent to Lord Keith instructing him not to agree to any capitulation unless the French forces surrendered themselves prisoners of war, and the orders were repeated to Sir Sidney Smith on the 8th

January. At the time therefore when he granted terms which were beyond his competence as a subordinate commander, because they protected the enemy against a force which was not under his control, orders had actually been received by his superior officer prohibiting him from concluding any arrangement of the kind. The British government not being in any way bound by the acts of Sir Sidney Smith, when the instructions sent by it were communicated to General Kleber in March, the latter with entire propriety assumed the agreement to be non-existent, and notwithstanding that Sir Sidney Smith stated his intention of endeavouring to procure its ratification, he immediately recommenced hostilities. The English Cabinet on their part, on hearing of the convention in the same month, while expressing their disapproval of it, directed, as the French general had supposed Sir Sidney Smith to be sufficiently authorised, that effect should be given to it; but General Menon, who had succeeded to the command before the arrival of their consent, thinking himself strong enough to hold the country, refused to renew the agreement, and it accordingly fell to the ground<sup>1</sup>.

§ 195. A safeguard is a protection to persons or property accorded as a grace by a belligerent. It may either consist in an order in writing, or in a guard of soldiers charged to prevent the performance of acts of war. The objects of such protections are commonly libraries, museums, and buildings of like nature, or neutral or friendly property; sometimes they are granted to an enemy as a special mark of respect. When a safeguard is given in the form of soldiers, the latter cannot be captured or attacked by the enemy<sup>2</sup>.

<sup>1</sup> De Garden, *Hist. des Traités de Paix*, vi. 210-14, 288; De Martens, *Rec. vii.* 1; Alison, *Hist. of Europe*, chap. xxxiv; *Parliamentary History*, xxxv. 587-97. The insinuation made by Wheaton (*Elem.* pt. iv. ch. ii. § 24) that the English government acted in bad faith is inexcusable. His reference to the parliamentary discussions shows that he had at least at some time been acquainted with the facts.

<sup>2</sup> Moser, *Versuch*, ix. ii. 452-6; De Martens, *Précis*, § 292; Halleck, ii. 353; Calvo, § 961-2.

PART III. § 196. A licence to trade is sometimes granted by a belligerent state to the subjects of its enemy, either in the form of a general permission to all enemy subjects to trade with a particular place or in particular articles, or of a special permission addressed to individuals to do an act of commerce or to carry on a commerce which is specified in the licence. In both cases all the disabilities under which an enemy labours are removed by the permission to the extent of its scope, so that he can contract with the subjects of the state and enforce his contracts in its courts<sup>1</sup>.

CHAP. VIII.  
Licences to trade.

The propriety of granting a licence is a question of policy, and the grant of a privilege exempting from the ordinary effects of war is a high exercise of sovereign power; as a rule consequently licences can only be given by the supreme authority of the state; a general or admiral-in-chief may however concede them to the extent of the needs of the force or district under his command. Thus during the war between the United States and Mexico, supplies being scarce in California and American vessels being wanting on that coast, licences for the import of supplies were issued by the commander of the Pacific squadron and by the military governor of the occupied province. If an officer in command grants licences in excess of his powers, his protection is good as against members of the force under his immediate command, but is ineffectual as against other forces of the state<sup>2</sup>.

It is an implied condition of the validity of all licences that an application for them, if made, shall not have been accompanied by misrepresentation or suppression of material facts. A licence, says Lord Stowell, 'is a thing *stricti juris*, to be obtained by a fair and candid representation and to be fairly pursued.' It is not even necessary, in order to invalidate it, that the misrepresentation or suppression shall

<sup>1</sup> Halleck, ii. 364 and 374; *Usparicha v. Noble*, 13 East, 341. According however to Lord Ellenborough in *Kensington v. Ingles* (8 East, 290) an enemy trader in England cannot sue in his own name, though he can sue through the medium of a British agent or trustee.

<sup>2</sup> Halleck, ii. 366; *The Hope*, i Dodson, 229.

have been made with intention to deceive; the grant of a licence being a question of policy, it cannot be certain that it would be made under any other circumstances than those disclosed in the application. Thus a licence was held void, although there was no proof of fraudulent intent, in the case of a person who had a house of business in Manchester, and who received leave under the description of a Manchester merchant to import goods into England, upon its being discovered that he had also a house of business in Holland and that he was the exporter from there as well as the importer into England. And in another case, a licence given to a person described as 'Hampe, of London, merchant' was invalidated on the ground that he was not at the time settled in London, but was only about to go there, and was in fact resident in Heligoland<sup>1</sup>.

The objects of a licence and the circumstances in view of which it is given are such that it is not necessary to the interests of the grantor that it shall be construed with literal accuracy, and on the other hand it is necessary that it shall be construed with reference to his intentions entertained, and capable of being supposed by a grantee acting in good faith to be entertained, at the time of gift. The principle therefore, which is applicable to the construction of a licence, is that a reasonable effect must be given to it in view, first, of the general conditions under which licences are granted, and secondly, of the particular circumstances of the case. Applying this principle to the several heads of the persons who may use a licence, the merchandise and means of conveyance which it will cover, the permissible amount of deviation in a voyage, and the time within which it is good, the following may be said.

<sup>1</sup> The *Vriendschap*, iv Rob. 98; *Klingender v. Bond*, 14 East, 484; the *Yonge Klassina*, v Rob. 297. That in the two latter cases the persons to whom the licences were issued were not enemies does not affect the principle of the decisions.

The fraudulent alteration of a licence destroys its validity, even where the person claiming protection under it is innocent of the fraud. The *Louise Charlotte de Guideroni*, i Dodson, 308.

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CHAP. VIII.

1. If a licence is granted to a particular person by name, he or his agent may use it for the purposes of his trade; if it be granted to a particular person and others, he may act either as principal or agent, and he need not necessarily have any interest in the property trade in which is carried on under it; if, finally, it be granted to a particular person by name, he is incompetent to act as the agent of other persons, and so in effect to make his personal privilege a subject of transfer and sale<sup>1</sup>.

2. When goods in favour of which a licence is given are limited in quantity or specified in character, it is not necessary that there shall be more than a fair general correspondence between the cargo conveyed and the amount and kind permitted; a small excess, that is to say, or small quantities of goods varying somewhat from the description in the licence, or even wholly foreign to it if they are inoffensive in their nature, will not entail condemnation. In the same way immaterial variations in the mode of conveyance are regarded as innocent. Thus when leave was given to import a cargo of brandy from the Charente, and owing to all vessels lying there having been put under an embargo importation from there was impossible, brandy of due quantity, but imported from Bordeaux, and in two small vessels instead of in a single large one, was released<sup>2</sup>.

3. As a rule, deviation from a prescribed course entails confiscation. Deviation caused by stress of weather is of course excepted; and it appears that to touch for orders at a port which, though lying out of the prescribed course, is not absolutely interdicted, is permissible<sup>3</sup>.

4. The effect of a limitation in time is different when it has reference to the beginning or to the end of a voyage.

<sup>1</sup> Halleck, ii. 370; *Feize v. Thompson*, i Taunton, 121; *Warin v. Scott*, iv Taunton, 605; *Robinson v. Morris*, v Taunton, 740. When a licence is not granted to specific individuals, but is perfectly general in its terms, the privilege of trade which it grants can be sold. *The Acteon*, i Dodson, 53.

<sup>2</sup> *The Vrow Cornelia*, Edwards, 350; Halleck, ii. 371-3.

<sup>3</sup> *The Manly*, i Dodson, 257; *The Emma*, Edwards, 366.

If a date is fixed as that before which a voyage must begin, the licence is voided if the vessel possessed of the licence has not set sail before the proper time; when, on the other hand, a date is fixed before which the vessel must arrive, stress of weather, delays interposed by the enemy, and other like causes are taken into consideration, and condemnation takes place on account only of delays which cannot be so accounted for <sup>1</sup>.

<sup>1</sup> The *Sarah Maria*, Edwards, 361; The *Æolus*, i Dodson, 300; *Effurth v. Smith*, v Taunton, 329; *Williams v. Marshall*, vi Taunton, 390.

## CHAPTER IX.

### TERMINATION OF WAR.

PART III. § 197. WAR is terminated by the conclusion of a treaty  
CHAP. IX. of peace, by simple cessation of hostilities, or by the conquest  
of one, or of part of one, of the belligerent states by the  
Modes in which war may be terminated. other.

Effects of a Treaty of Peace in setting up rights and obligations. § 198. The general effect of a treaty of peace is to replace the belligerent countries in their normal relation to each other. The state of peace is set up, and they enter at once into all the rights and are bound by all the duties which are implied in that relation. It necessarily follows that, so soon as peace is concluded, all acts must cease which are permitted only in time of war. Thus if an army is in occupation of hostile territory when peace is made, not only can it levy no more contributions or requisitions during such time as may elapse before it evacuates the country, but it cannot demand arrears of those of which the payment has been already ordered. It is obviously not an exception to this rule that an enemy may be authorised by the treaty of peace itself to do certain acts which, apart from agreement, would be acts of war; such as to remain in occupation of territory until specific stipulations have been fulfilled; or to levy contributions and requisitions if the subsistence of the troops in occupation is not provided for by the government of the occupied district; a state may of course always contract itself out of its common law rights. It can also hardly

be said to be an exception that although prisoners of war acquire a right to their freedom by the simple fact of the conclusion of peace, it is not necessary that their actual liberation shall instantaneously take place; their return to their own country may be subordinated to such rules, and they may be so far kept under military surveillance, as may be dictated by reasonable precaution against misconduct or even by reasonable regard for the convenience of the state by which they have been captured<sup>1</sup>.

By the principle commonly called that of *uti possidetis* it is understood that the simple conclusion of peace, if no express stipulation accompanies it, or in so far as express stipulations do not extend, vests in the two belligerents as absolute property whatever they respectively have under their actual control in the case of territory and things attached to it, and in the case of moveables whatever they have in their legal possession at the moment; occupied territory, for example, is transferred to the occupying power, and moveables, on the other hand, which have been in the territory of an enemy during the war without being confiscated remain the property of the original owner. The doctrine is not altogether satisfactory theoretically, but it supplies a practical rule for the settlement of such matters relating to property and sovereignty as may have been omitted in a treaty, or for covering concessions which one or other party has been unwilling to make in words. This advantage could evidently not be claimed by the necessarily alternative doctrine that, except in so far as expressly provided, all things should return to their state before the war<sup>2</sup>.

When a stipulation to the latter effect is made it is to be understood, if couched in general terms, to mean only that any territory belonging to one party, which may be occupied

<sup>1</sup> Vattel, liv. iv. ch. ii. § 19; Halleck, i. 265; Bluntchli, § 708, 716, 717; Calvo, § 1298, 1301, 1303.

<sup>2</sup> Vattel, liv. iv. ch. ii. § 21; Heffter, § 181; Phillimore, iii. § dlxxxvi; Bluntchli, § 715; Nuestra Señora de los Dolores, i Edwards, 60.



PART III. by the other party, with the buildings &c. on it, is to be  
 CHAP. IX. handed back with no further changes than have been brought  
 about by the operations of war, or by acts legitimately done  
 during the course of hostilities. The clause covers neither  
 property which has been appropriated, nor property which  
 has been destroyed or damaged, in accordance with the laws  
 of war<sup>1</sup>.

Date from  
 which hos-  
 tilities  
 cease on  
 conclusion  
 of a treaty.

§ 199. Notwithstanding that treaties only become de-  
 finitively binding on the states between which they are made  
 on being ratified, a treaty of peace is so far temporarily  
 binding from the date of signature, unless some other date  
 for the commencement of its operation is fixed by the treaty  
 itself, that hostilities must immediately cease. It acts as  
 an armistice, if no separate armistice is concluded<sup>2</sup>. The  
 rule is obviously founded on the fact that the chance in  
 any given case that ratification will be refused is not sufficient  
 to justify fresh attempts on the part of either belligerent  
 to secure a better position for himself at the cost of effusion of  
 blood, and of infliction of misery on the population inhabiting  
 the seat of war.

The exceptional case that a future date is fixed by a treaty  
 for the commencement of peace occurs when hostilities extend  
 to regions with which immediate communication is impos-  
 sible. Under such circumstances it is usual to make the  
 termination of hostilities depend upon the length of time  
 necessary for sending information that a treaty has been  
 concluded, and to fix accordingly different dates after which  
 acts of war become illegal in different places. When in such  
 cases duly authenticated information reaches a given place  
 before the time fixed for the cessation of hostilities, the  
 question arises whether further hostilities are legitimate, or  
 whether, as a margin of time is only given in order that

<sup>1</sup> Vattel, liv. iv. ch. ii. § 22, and ch. iii. § 31; Phillimore, iii. § dlxxxiv.

<sup>2</sup> It is the practice to conclude an armistice before signing a treaty of peace; the above rule could therefore seldom, if ever, come into operation, unless as the result of accidental circumstances.

knowledge may be obtained, they ought at once to be stopped. The latter and reasonable doctrine seems now to be thoroughly accepted in principle ; but its value is somewhat diminished by the reservation, which is perhaps necessarily made, that a naval or military commander is not obliged to accept any information as duly authenticated, the correctness of which is not in some way attested by his own government. In the case of the English ship *Swineherd*, for example, a vessel provided with letters of marque sailed from Calcutta for England before the end of the period of five months fixed by the treaty of Amiens for the termination of hostilities in the Indian seas, but after the news of peace had reached Calcutta, and after a proclamation of George III, requiring his subjects to abstain from hostilities from the time fixed, and therein mentioned, had been published in a Calcutta paper. The *Swineherd* had a copy of this proclamation on board. She was captured by the *Bellone*, a French privateer, without resistance, there being only enough powder on board for signalling purposes. The *Bellone* had been informed by a Portuguese vessel bearing a flag of truce which had put into the Mauritius, by an Arab vessel, and by an English vessel which she had captured, that peace was concluded ; her commander was shown the proclamation in the Gazette extraordinary of Calcutta, and he could see for himself that a privateer, which by the date of the Gazette must have sailed lately from Calcutta, was without powder ; so that there was no room to doubt the accuracy of the information given or the good faith of the statement that the intentions of the *Swineherd* herself were peaceful. The vessel was nevertheless condemned in France as good prize. In a case like this, in which the fact that peace had been concluded was established beyond all possibility of question, the rule that an officer in command of armed forces of his state may disregard all information which is not authenticated by his own government, operates with extreme harshness ; and though the right of seizure could scarcely be abandoned,

PART III.

CHAP. IX.

Case of the  
*Swineherd*.

PART III. there seems to be no reason for not subsequently restoring  
 CHAP. IX. ships captured after receipt of information which should turn out in the end to be correct. For most purposes of war however the rule must be a hard and fast one. The consequences of suspending hostilities upon erroneous information might easily be serious, and if it were once conceded that commanders were ever bound to act upon information not proceeding from their own government, it would be difficult to prevent them from being sometimes misled by information intentionally deceptive<sup>1</sup>.

Effects of a treaty of peace with reference to § 200. A treaty of peace has the following effects with reference to acts done before the commencement of the war which it has terminated.

I. Acts done before the commencement of the war. 1. It puts an end to all pretensions, and draws a veil over all quarrels, out of which the war has arisen. It has set up a new order of things, which forms a fresh starting-point, and behind which neither state may look. War consequently cannot be renewed upon the same grounds.

2. It revives the execution of international engagements of a certain kind, when such execution has been suspended by one or both of the parties to a war<sup>2</sup>.

3. In a general way it revives all private rights, and restores the remedies which have been suspended during the war;—contracts, for example, are revived between private persons if they are not of such a kind as to be necessarily put an end to by war<sup>3</sup>, and if their fulfilment has not been rendered impossible by such acts of a belligerent government as the confiscation of debts due by subjects to those of its enemy; the courts also are re-opened for the enforcement of claims of every kind<sup>4</sup>.

§ 201. As between the contracting states, a treaty of peace

<sup>1</sup> Kent, Comm. i. 171; Wheaton, Elem. pt. iv. ch. iv. § 5; Heffter, § 183; La Bellone contre le Porcher, Pistoye et Duverdy, i. 149.

<sup>2</sup> See § 125.

<sup>3</sup> See § 126.

<sup>4</sup> Wheaton, Elem. pt. iv. ch. iv. § 3; Heffter, § 180.

is a final settlement of all matters connected with the war to **PART III.** which it puts an end. If therefore any acts have been done **CHAP. IX.** during the course of hostilities in excess or irrespectively of **2. Acts done during the** the rights of war under the authority of one of the belligerent **war.** states, the enemy state cannot urge complaints or claims from the moment that a treaty is signed, either on its own behalf or on behalf of its subjects.

It is possible however that ordinary acts of war may have been done without sufficient authority, that wrongful acts may have been done wholly without authority, and that subjects of one of the two belligerent states, without having committed treason, may yet have compromised themselves with their own government by dealings with the enemy. In order to bury the occurrences of the war in oblivion, and to prevent ill-feeling from being kept alive, in order also to protect men who may only have been guilty of a technical wrong, or who may at any rate have been carried away by the excitement of hostilities, and finally in the common interests of belligerents who may be in occupation of an enemy's country, it is understood that persons acting in any of the ways above mentioned are protected by the conclusion of peace from all civil or criminal processes to which they might be otherwise exposed in consequence of their conduct in the war, except civil actions arising out of private contracts, and criminal prosecutions for acts recognised as crimes by the law of the country to which the doer belongs, and done under circumstances which remove them from the category of acts having relation to the war. Actions, for example, can be brought on ransom bills; if a prisoner of war borrows money or runs into debt he may be sued; or if a prisoner of war or a soldier on service commits a common murder he may be tried and punished. The immunity thus conceded is called an amnesty.

Usually, but far from invariably, the rule of law is fortified by express stipulation, and a clause securing an amnesty is inserted in treaties of peace. Though unnecessary for other

PART III. purposes, it is required as a safeguard for subjects of a state  
 CHAP. IX. who, having had distinctly treasonable relations with an  
 — enemy, are not protected by an amnesty which is only  
 implied<sup>1</sup>.

3. Acts of  
 war done  
 subse-  
 quently to  
 the con-  
 clusion of  
 peace.

§ 202. Acts of war done subsequently to the conclusion of peace, or to the time fixed for the termination of hostilities, although done in ignorance of the existence of peace, are necessarily null. They being so, the effects which they have actually produced must be so far as possible undone, and compensation must be given for the harm suffered through such effects as cannot be undone. Thus, territory which has been occupied must be given up; ships which have been captured must be restored; damage from bombardment or from loss of time or market, &c. ought to be compensated for; and it has been held in the English courts, with the general approbation of subsequent writers, that compensation may be recovered by an injured party from the officer through whose operations injury has been suffered, and that it is for the government of the latter to hold him harmless. It is obvious, on the other hand, that acts of hostility done in ignorance of peace entail no criminal responsibility<sup>2</sup>.

<sup>1</sup> Halleck, i. 258; Bluntschli, § 710-12; Calvo, § 1302; Lord Stowell in the *Molly*, i Dodson, 396; Crawford and Maclean v. The *William Penn*, iii Washington, 491-3, and the cases there cited: and for examples of amnesty clauses see the Treaties of Tilsit (De Martens, Rec. viii. 640 and 666), and that of Paris in 1856 (Hertslet, 1254). Some writers, e.g. Vattel (liv. iv. ch. ii. § 20 and 22), Wheaton (Elem. pt. iv. ch. iv. § 3), and Heffter (§ 180), treat an amnesty as applying to conduct of one belligerent state towards the other, and the language of some of the older treaties stipulates for oblivion of all acts done on the two sides respectively; see, e.g. the Treaty of Teschen (De Martens, Rec. ii. 663).

<sup>2</sup> Halleck, ii. 262-4; Phillimore, iii. § dxviii; Bluntschli, § 709; Calvo, § 1308. In the case of the *Mentor*, which was an American ship captured off the Delaware by English cruisers, all parties being ignorant that a cessation of hostilities had taken place, Lord Stowell said, 'If an act of mischief was done by the king's officers, through ignorance, in a place where no act of hostility ought to have been exercised, it does not necessarily follow that mere ignorance of that fact would protect the officers from civil responsibility. If by articles a place or district was put under the king's peace, and an act of hostility was afterwards committed therein, the injured party might have a right to resort to a court of prize, to show that he had been injured by this breach of the peace,

§ 203. The termination of war by simple cessation of hostilities is extremely rare. Possibly the commonly cited case of the war between Sweden and Poland, which ceased in this manner in 1716, is the only unequivocal instance; though it is likely that if anything had occurred to compel the setting up of distinct relations of some kind between Spain and her revolted colonies in America during the long period which elapsed between the establishment of their independence and their recognition of the mother country, it would have been found that the existence of peace was tacitly assumed. No active hostilities appear to have been carried on later than the year 1825, and no effort was made to hold neutral states or individuals to the obligations imposed by a state of war; but it was not till 1840 that intercourse with any of the Central or South American republics, except Mexico, was authorised by the Spanish government. In that year commercial vessels of the republic of Ecuador were admitted by royal decree into the ports of the kingdom, and at various subsequent times like decrees were issued in favour of the remaining states. It was only however in 1844, three years after commercial relations had been established, that Chile, which was the earliest of the republics except Mexico to receive recognition, was formally acknowledged to be independent; and Venezuela, which was the last, was not recognised till 1850<sup>1</sup>.

The inconvenience of such a state of things is evident. When war dies insensibly out the date of its termination is necessarily uncertain. During a considerable time the belligerent states and their subjects must be doubtful as to the light in which they are regarded by the other party to the war, and neutral states and individuals must be equally doubtful as to the extent of their rights and obligations. Nevertheless a time must come sooner or later at which it is clear that a state of peace has supervened upon that of war.

and was entitled to compensation; and if the officer acted through ignorance his own government must protect him;’ . . . he is to be ‘borne harmless at the expense of that government.’ The Mentor, i Rob. 183.

<sup>1</sup> Lawrence, Commentaire, ii. 327.

PART III. When this has arrived, the effects of the informal establish-  
 CHAP. IX.  
 — ment of peace are identical with those general effects flowing from the conclusion of a treaty which are necessarily consequent upon the existence of a state of peace. Beyond this it is difficult to say whether any effects would be produced. It is at any rate certain that the pretensions which may have given rise to the war cannot be regarded as abandoned, and that the quarrel cannot be assumed to have been definitively settled. It would always be open to either side to begin a fresh war upon the same grounds as those which supplied the motive for hostilities in the first instance.

Conquest. § 204. Conquest consists in the appropriation of the property in, and of the sovereignty over, a part or the whole of the territory of a state, and when definitively accomplished vests the whole rights of property and sovereignty over such territory in the conquering state.

When it  
 can be  
 held to be  
 effected.

As in the case of other modes of acquisition by unilateral acts, it is necessary to the accomplishment of conquest that intention to appropriate and ability to keep shall be combined. Intention to appropriate is invariably, and perhaps necessarily, shown by a formal declaration or proclamation of annexation. Ability to keep must be proved either by the conclusion of peace or by the establishment of an equivalent state of things; the conqueror must be able to show that he has solid possession, and that he has a reasonable probability of being able to maintain possession, in the same way and to much the same degree as a political society which claims to be a state must show that it has independence and a reasonable probability of maintaining it. A treaty of peace by which the principle of *uti possidetis* is allowed to operate affords the best evidence of conquest, just as recognition of the independence of a revolted province on the part of the mother country is the best evidence of the establishment of a new state; but possession which is *de facto* undisputed, and the lapse of a certain time, the length of which must depend on the circumstances of the case, are also admitted to be proof when combined; and recog-

nition by foreign states, though in strictness only conclusive, like all other unilateral acts, against the recognising states themselves, affords confirmation which is valuable in proportion to the number and distinctness of the sources from which it springs.

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Notwithstanding the necessary uncertainty in the abstract of evidence supplied by possession and recognition, the fact of conquest is generally well marked enough to be unquestioned. One instructive modern case however exists in which the conclusiveness of an alleged conquest was disputed. In the beginning of the present century the Elector of Hesse Cassel held as private property domains within his own territory, and sums lent on mortgage to subjects of other German states. Shortly after the battle of Jena he was expelled from his dominions by French troops, and he did not return until French domination in Germany was put an end to by the battle of Leipzig. For about a year after its occupation Hesse Cassel remained under the immediate government of Napoleon; it was then handed over by him to the newly-formed kingdom of Westphalia, the existence of which was expressly recognised by Prussia and Russia in the treaty of Tilsit and, through the maintenance of friendly relations, by such other European states as were at peace with France and its satellites. Napoleon intended to effect a conquest, he dealt with the territory which he had entered as being conquered, and was acknowledged by a considerable number of states to have made a definitive conquest. One of his acts of conquest, effected before the transfer of the territory to the kingdom of Westphalia, was to confiscate the private property of the Elector, which, as the latter after his expulsion had taken service in the Prussian army, was seized apparently as that of a person remaining in arms against the legitimate sovereign of the state. However revolting it may be morally that Napoleon should have taken advantage of the position which he had acquired through his own wrong-doing to inflict further injury upon a man whom he had already plundered without provocation, there can be

Case of  
 Hesse  
 Cassel.



PART III. no doubt that if his conquest was complete he was within his  
 CHAP. IX. strict legal rights. Was then his conquest a complete one?

The question was first raised, in a suit brought by the Elector after his return, before the Mecklenburg courts, as creditor of the estate of a certain Count Hahn Hahn. The Count had borrowed money on mortgage from the Elector before his expulsion, and had obtained a release in full from Napoleon on payment of a portion of the debt. The Elector contested the validity of the discharge. The Mecklenburg court appears not to have given judgment, but to have remitted the matter to the University of Breslau, whence it was successively carried by way of appeal to two other German Universities. The ultimate judgment affirmed the legality of the act of confiscation on the grounds—

1. That the restored government of the Elector could not be regarded as a continuation of his former government, because he had not been constantly in arms against Napoleon during his absence from Hesse Cassel, and because he had been treated by the peaces of Tilsit and Schönbrunn as politically extinct, the kingdom of Westphalia having been recognised as occupying the place of the electorate.

2. That Napoleon had in fact effected a conquest, and consequently had a right as sovereign to confiscate the property of an active enemy of the state.

3. That even if the property of the Elector could have been held to revert with the conclusion of peace, a restored owner, 'according to the letter of the Roman law,' must take his property as he finds it, without compensation for the damage which it may have suffered in the interval<sup>1</sup>.

The above judgment appears to have met with very general approval; and though the Congress of Vienna refused to interfere to prevent the resumption by the Elector of alienated domains within the electorate, there is nothing to show that any of the powers represented there considered his action to be right under the circumstances of the particular case;

<sup>1</sup> Phillimore, pt. xii. ch. vi.

Prussia pronounced herself adversely to it<sup>1</sup>. There can indeed be no doubt that the title which Napoleon assumed himself to have acquired by conquest became consolidated by lapse of time, and that alienations made in virtue of it were consequently good. It does not follow from this that the confiscation was in the first instance valid. It took place immediately after the conclusion of the treaties of Tilsit. Although it was impossible to suppose that Hesse Cassel would ever be able to shake off the yoke of France for herself, there was nothing in the aspect of Europe to induce the belief that the settlement of Germany then made was a final one; war still continued with England; it was certain that war would sooner or later be renewed on the continent, and it was necessarily uncertain how soon it might arrive; finally, most of the recognitions given to the kingdom of Westphalia were of little value, because they were given by states which were hardly free agents in the matter. In such a state of things time was absolutely necessary to consolidate the conquest. At first Napoleon and those who derived their title from him were merely occupiers with the pretensions of conquerors. But with the lapse of time the character of occupier insensibly changed into that of a true conqueror; and when the fact of conquest was definitively established, it validated retroactively acts which the conqueror had prematurely done in that capacity. It would be idle to argue,

<sup>1</sup> Sir R. Phillimore points to the fact that 'Austria, Prussia, Russia, the Bourbon sovereigns in France and Italy, Sardinia, and the Pope' left undisturbed titles acquired through the intrusive rulers of territory which they had lost during the revolutionary and Napoleonic wars, as confirmatory of the view that the conduct of the Elector was wrong. The conduct of the Elector was no doubt wrong, but the case against him is not made stronger by suggesting inexact analogies. Possession of the territory wrested from Austria, Prussia, and Russia was in all cases confirmed by treaty; the alienations made in France were the result, not of foreign conquest, but of internal revolution; and though the case of the Italian States is very much nearer to that of Hesse, it is prevented from being identical by the much greater duration of the foreign intrusion to which they were subjected. The government of Hanover, which was in exactly the same position as Hesse, acted in the same manner as the Elector.

PART III. under all the circumstances of the case, that possession had  
 CHAP. IX. not hardened into conquest during the interval between  
 — 1806 and 1813.

Effects of  
 conquest.

§ 205. The effects of a conquest are :—

1. To validate acts done in excess of the rights of a military occupant between the time that the intention to conquer has been signified and that at which conquest is proved to be completed<sup>1</sup>.

2. To confer upon the conquering state property in the conquered territory, and to invest it with the rights and affect it with the obligations which have been mentioned as accompanying a territory upon its absorption into a foreign state<sup>2</sup>.

3. To invest the conquering state with sovereignty over the subjects of the wholly or partially conquered state who are upon the conquered territory at the time when the conquest is definitively effected, in such manner that they become subjects of the state and are naturalised for external purposes, without necessarily acquiring the full status of subject or citizen for internal purposes<sup>3</sup>.

Difference  
 between  
 the effect  
 of cession  
 and con-  
 quest.

§ 206. In strictness, the effects of a cession, of a treaty concluded on the basis of *uti possidetis*, and of conquest, upon the inhabitants of territory which changes hands at the conclusion of a war are identical, though for somewhat different reasons in the three cases. In each case the population is subjected to the sovereignty of the state by which the territory is acquired ; but while in the cases of bare conquest,

<sup>1</sup> Halleck, ii. 484; Calvo, § 997.

<sup>2</sup> See § 28 and 29, and compare also § 27.

<sup>3</sup> Dana, note to Wheaton's Elem., No. 169; Lord Mansfield in *Hall v. Campbell*, 1 Cowper, 208. For the position of the inhabitants of a country conquered by the United States, see *antea*, p. 202, note. For French law and practice, see Foelix, § 35. For the action of the allied powers in 1814, see Lawrence, *Commentaire*, iii. 192. 'A rule of public law,' it is laid down in a recent American case, 'is that the conqueror who has obtained permanent possession of the enemy's country has the right to forbid the departure of his new subjects or citizens from it, and to exercise his sovereign authority over them.' *United States v. De Repentigny, v Wallace*, 260.

and of conquest confirmed by a treaty grounded on the principle of *uti possidetis*, the sovereignty is simply appropriated by the conquering state, in that of express cession a transfer of it is effected through an act of the state making the cession, by which the members of that state are bound.

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It is however usual in modern treaties to insert a clause securing liberty to inhabitants of a ceded country to keep their nationality of origin on retiring within the territory remaining to their state of origin, and allowing them a certain time to arrange their affairs and dispose of landed and other property which they may be unable to take with them<sup>1</sup>.

<sup>1</sup> The Treaty of Vienna of 1809 gave six years (De Martens, *Nouv. Rec.* i. 214), that of Frederikshamm in the same year gave three years (*ib.* 25), those of Zurich in 1859, of Vienna in 1864, and of Vienna in 1866 afforded one year (*Nouv. Rec. Gén.* xvi. ii. 520, xvii. ii. 482, and xviii. 409). The Treaty of Frankfort in 1871 conceded liberty of emigration until October 1, 1872 (*Nouv. Rec. Gén.* xix. 689).

Halleck (ii. 486-7) and Calvo (§ 999) think that inhabitants of a ceded country have a right of keeping their old allegiance if they choose to emigrate. It is unquestionable that to prevent them from doing so would be harsh and oppressive in the extreme, but as the possession of such a right is inconsistent with the general principles of law, it could only have been established by a practice of which there is certainly as yet no reasonable evidence. In the *United States v. De Repentigny*, already cited, it was expressly laid down that persons choosing to adhere without permission to their former state 'deprive themselves of protection to their property' situated within the conquered portion; and the alienation of the property of the Elector of Hesse Cassel (see *antea*, § 204), which, on the assumption that a conquest was effected, has universally been held to be good, would have been illegal if persons have a right to withdraw themselves from an allegiance imposed by conquest, and therefore *a fortiori* by cession. It is of course not to the point that as between persons adhering to their former state, and removing into it, and that state the national character of origin is always preserved; the state of origin has no reason for rejecting them or for refusing them the rights of subjects.

## PART IV.

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### CHAPTER I.

#### THE COMMENCEMENT OF WAR IN ITS RELATION TO NEUTRALITY.

**PART IV.** § 207. It was shown in an earlier chapter that as between  
**CHAP. I.**  
Notification of the outbreak of war to be made when possible. belligerents no necessity exists for a notification that war has begun or is about to begin. As between belligerents and neutrals however the case stands differently. Neutrals are affected by duties and are exposed to liabilities. It is due to them as friends that a belligerent shall not if possible allow them to find out incidentally and perhaps with uncertainty that war has commenced, but that they shall be individually informed of its existence.

Hence it is in part that it has long been a common practice to address a manifesto to neutral states, the date of which serves to fix the moment at which war begins; and it is evident that when practicable the issue of such a manifesto is not only convenient, but is as obligatory as an act, which after all is one of courtesy, can well be. Where war breaks out at a moment which is not determined by the respective governments engaged, or by that which has just done acts of war; as for example when it results from conditional orders given to an armed force, or from an act of self-preservation on pacific intervention being regarded as hostile, a manifesto cannot of course be issued. In such cases it is the clear duty of belligerents to give every indulgence to neutrals; and where war breaks out through the performance

of an act which one of the two parties elects to consider hostile, the date of its commencement, though carried back as between the belligerents to the occurrence of the hostile act, must be taken as against neutrals to be that of the election through which third powers become acquainted with the fact of war.

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CHAP. I.  
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## CHAPTER II.

### GROWTH OF THE LAW AFFECTING BELLIGERENT AND NEUTRAL STATES TO THE END OF THE EIGHTEENTH CENTURY.

PART IV. § 208. UNTIL the latter part of the eighteenth century  
CHAP. II. the mutual relations of neutral and belligerent states were,  
Absence of on the whole, the subject of the least determinate part of  
the con- international usage. At a time when the daily necessities  
ception of of intercourse had forced nations to work out an at least  
neutral duty in the rudimentary code for neutral trade in time of war, the re-  
Middle Ages. lations of states themselves remained in a chaos, from which  
order was very slowly developed.

Throughout the Middle Ages it was neither contrary to habit nor repugnant to moral opinion that a prince should commit, or allow his subjects to commit, acts of flagrant hostility against countries with which he was formally at peace. It may even be said broadly that at the end of the sixteenth century a neutral state might allow the enemy of its ally to levy troops within its dominions, it might lend him money or ships of war, and it might supply him with munitions of war. What the state might do its subjects might also do. The common law of nations permitted a license  
Its growth. which was checked only by the fear of immediate war. But as it was the interest of every one in turn to diminish the wide liberty of action which was exercised by neutral powers, most

nations became gradually so bound by treaties on every hand as to make a rough friendliness their standard of conduct. For centuries innumerable treaties, not only of simple peace and friendship, but even of defensive alliance, contained stipulations that the contracting parties would not assist the enemies of the other, either publicly with auxiliary forces or subsidies, or privately by indirect means. They were also to prevent their subjects from doing like acts<sup>1</sup>. The

PART IV.  
CHAP. II.

<sup>1</sup> The treaties are sometimes couched in general, and sometimes in very specific language. The following may be taken as fairly typical specimens:— In 1502, Henry VII and Maximilian, King of the Romans, agreed ‘quod nullus dictorum principum movebit aut faciet etc. guerram etc., nec dabit auxilium, consilium, vel favorem, publice vel occulte, ut hujusmodi guerra moveatur vel excitatur quovismodo.’ In 1505, Henry VII and the Elector of Saxony covenanted that neither of the contracting parties ‘patrias, dominia, etc. alterius a suis subditis invadi aut expugnari permittet, sed expresse et cum effectu prohibebit et impediet,’ and neither of them ‘alicui alteri patrias, dominia etc., alterius invadenti etc. consilium, auxilium, favorem, subsidium, naves, pecunias, gentes armorum, victualia aut aliam assistentiam quamcunque publice vel occulte dabit, aut præstari consentiet, sed palam et expresse prohibebit et impediet.’

The following treaties may be cited as giving sufficiently varied examples of the stipulations which were commonly made. It will be observed to how late a period it was necessary to insist upon them:—

### I. TREATIES OF DEFENSIVE ALLIANCE.

1465.	Edward IV and Christian I of Denmark	Dumont, Corps Diplomatique	iii. i. 586.
1467.	Edward IV and Henry IV of Castile	„	iii. i. 588.
1475.	Charles Duke of Burgundy and Galeazzo Sforza	„	iii. i. 496.
1475.	Frederic III and Louis XI	„	iii. i. 521.
1506.	Henry VII and Joanna Queen of Castile	„	iv. i. 76.
1508.	Henry VII and Joanna Queen of Castile	„	iv. i. 103.
1510.	Ferdinand King of Aragon and Joanna Queen of Castile	„	iv. i. 215.
1623.	James I and Michael Federowitz Grand Duke of Russia	„	v. ii. 437.
1655.	Frederic William of Brandenburg and the United Provinces	„	vi. ii. 111.

### II. TREATIES OF SIMPLE PEACE AND FRIENDSHIP.

1559.	Elizabeth and Mary of Scotland	Dumont, Corps Diplomatique	v. i. 29.
1559.	Peace of Château Cambresis	„	v. i. 32.



PART IV. habits thus formed reacted upon thought, and men grew  
 CHAP. II. willing to admit the doctrine, that what they had become  
 accustomed to do flowed from an obligation dictated by  
 natural law. By the latter half of the seventeenth century  
 it was no longer necessary to stipulate for neutrality in  
 precise language. The neutrality article dwindled into a  
 promise of mutual friendship<sup>1</sup>. But it would be a mistake  
 to infer from this that international practice conformed to  
 the more stringent provisions of former treaties. These had  
 certainly not been observed when a sovereign felt tempted  
 to infringe them; and though thinkers had begun to apply  
 ethics to the conduct of nations, no one had so marked out  
 the principles of neutrality that particular usages could be  
 compared with them and improved with their help. Grotius  
 gave the subject no serious consideration, and went no farther  
 in his meagre chapter 'De his qui in bello medii sunt' than  
 to say that 'it is the duty of those who stand apart from

View of  
the duty of  
neutral  
states  
taken in  
the seven-  
teenth  
century;

by Gro-  
tius.

Treaties—continued.

1564.	Elizabeth and Charles IX	.	.	.	"	v. i. 211.
1610.	Louis XIII and James I	.	.	.	"	v. ii. 149.
1631.	Louis XIII and the Elector Maximilian					
	of Bavaria	.	.	.	.	vi. i. 14.

The Treaty of Münster, in 1648, provided that '*alter alterius hostes presentes aut futuros nullo unquam titulo, vel prætextu, vel ullius controversiæ bellive ratione contra alterum armis, pecunia, milite, commeatu aliterve juvet, aut illis copiis quas contra aliquem hujus pacificationis consortium a quocumque duci contigerit, receptum, stativa, transitum indulgeat.*' Dumont, vi. i. 451.

<sup>1</sup> The Peace of the Pyrenees (1659) has merely the general words, '*Les Roys, &c., eviteront de bonne foy tant qu'il leur sera possible le dommage l'un de l'autre.*' Dumont, vi. ii. 265. Like language is found in the Treaty of Breda, between England and France, in 1667 (Dumont, vii. i. 41); in the Peace of Lisbon, between Spain and Portugal, in 1668 (Dumont, vii. i. 73); in the Treaty of Nymeguen, in 1678 (Dumont, vii. i. 357); and the Peace of Ryswick, in 1697 (Dumont, vii. ii. 389). The treaty between England and Denmark in 1669, and that between the same powers in 1686 (Dumont, vii. i. 127), are exceptions. The contracting parties promise '*se alterutrius hostibus, qui aggressores fuerint, nihil subsidii bellici, veluti milites, arma, machinas, bombardas, naves et alia bello gerendo apta et necessaria subministraturos, aut suis subditis subministrare passuros; si vero alterutrius regis subditi hisce contravenire audeant, tum ille rex, cujus subditi id fecerint, obstrictus erit in eos acerbissimis poenis, tanquam seditiosos et foedifragos animadvertere.*'

a war to do nothing which may strengthen the side whose cause is unjust, or which may hinder the movements of him who is carrying on a just war; and in a doubtful case, to act alike to both sides, in permitting transit, in supplying provisions to the respective armies, and in not assisting persons besieged<sup>1</sup>.’ Elsewhere he incidentally remarks that ‘it is not inconsistent with an alliance that those who are attacked by one of the parties to it shall be defended by the other—peace being maintained in other respects<sup>2</sup>.’ Various quotations from ancient authors, from which he draws no conclusions, suggest that he looked upon an impartial permission to raise levies as consistent with neutrality, but that the grant of a subsidy or the supply of munitions of war was an hostile act.

So long as these somewhat incoherent doctrines alone represented the views of theorists it is not strange that usage was in general rude, or that countries concluded treaties with the express object of restricting its operation on themselves. Henry IV allowed entire regiments of French soldiers to pass into the service of the United Provinces; the expedition, numbering 6,000 men, which the Marquis of Hamilton, with the consent of his sovereign, led to the assistance of Gustavus Adolphus in 1631, was exceptional only in its size<sup>3</sup>; and Burnet draws a lively picture of the character of English neutrality at a much later time. In 1677 complaints were made in Parliament ‘of the regiments that the King kept in the French army, and of the great service done by them. It is true the King suffered the Dutch to make levies. But

PART IV.

CHAP. II.

Practice of  
the seven-  
teenth  
century.

<sup>1</sup> ‘Eorum qui a bello abstinent officium est nihil facere, quo validior fiat is qui improbam fovet causam, aut quo justum bellum gerentis motus impediatur; in re vero dubia aequos se præbere utrisque in permittendo transitu, in comœatu præbendo legionibus, in obsessis non sublevandis.’ *De Jure Belli et Pacis*, lib. iii. cap. xvii.

<sup>2</sup> ‘Non pugnat autem cum foedere, ut quos alii offenderent, hi defenderentur ab aliis, manente de caetero pace.’ *Lib. ii. cap. xvi.*

<sup>3</sup> Martin, *Hist. de France*, x. 497; Burnet, *Memoirs of James and William, Dukes of Hamilton*, pp. 7 and 9.

PART IV. there was another sort of encouragement given to the levies  
 CHAP. II. of France, particularly in Scotland; where it looked liker  
 — a press than a levy. They had not only the public gaols given them to keep their men in, but when these were full, they had the castle of Edinburgh assigned to them, till ships were ready for their transport<sup>1</sup>.

It was important to small and ambitious states, which occupied a larger space in the field of politics than was justified by their inherent power, to keep their hold on foreign recruiting-grounds. A treaty therefore between Brandenburg and the United Provinces in 1655 declares that 'the levy of land or sea forces, and the purchase, lading, and equipment of vessels of war shall always be permitted, and be lawful, in the lands and harbours of the two parties;' and in 1656 a treaty between England and Sweden provided, more in the interest of the latter than the former power, that it should be 'lawful for either of the contracting parties to raise soldiers and seamen by beat of drum within the kingdoms, countries, and cities of the other, and to hire men of war and ships of burden<sup>2</sup>.'

A treaty of neutrality may secure something more, and will certainly provide for nothing less, than the bare performance of strict neutral duties. By that which was concluded between Louis XIV and the Duke of Brunswick in 1675, the Duke promises to observe a 'sincere and perfect neutrality towards the King. . . . In conformity with this neutrality, his Highness will not anywhere assist the enemies of the King directly or indirectly, and will not permit any levies to be made in his states, nor the passage of troops through them, nor the formation of any kind of magazines<sup>3</sup>.'

In other words he promises:—

<sup>1</sup> Hist. of his own Time, ii. 114 (ed. 1823).

<sup>2</sup> Dumont, vi. ii. 111, and vi. ii. 125. The provision was 'propounded by the ambassador' of Sweden, and six thousand men were levied for Sweden in England. Whitelock's Memorials, 633-6.

<sup>3</sup> Dumont, vii. i. 312.

1. That no active assistance shall be given by Brunswick to any enemy of France as by one sovereign state to another. PART IV.  
CHAP. II.

2. That it will not afford passive aid by permitting enlistments or by allowing its territory to be made a base of operations.

He does not promise to restrain the individual action of his subjects in any way.

It would therefore seem that towards the end of the seventeenth century the utmost that could be demanded by a belligerent from a neutral state was that the latter should refrain from giving active help to the enemy of the belligerent, and should prevent his territory from being continuously used for a hostile purpose. Indeed, his customary right to so much as this may have been far from unquestionable; and neither then nor long afterwards had he any good grounds for complaint if privileges given to his enemy could be shared by himself.

It must not however be forgotten that though the practice of neutrality in the seventeenth century was highly imperfect, and though its theory was not thought out, the ethical view of the general relations of states to each other which was commonly taken by writers, prepared the way for a more rapid settlement of its fundamental conceptions, when once attention was directed to them, than might otherwise have taken place.

§ 209. The right of a sovereign to forbid and to resent the performance of acts of war within his lands or waters was theoretically held as fully then as now to be inherent in the fact of sovereignty<sup>1</sup>. In 1604, James I issued a Proclamation directing that 'all officers and subjects by sea and land shall rescue and succour all such merchants and others as shall fall within the danger of such as await the coasts.' And in 1675, Sir Leoline Jenkins, in writing to the King

Rights of  
a neutral  
state as  
understood  
in the  
seven-  
teenth  
century.

<sup>1</sup> 'Alienum territorium securitatem praestat,' says Albericus Gentilis (De Jure Belli, lib. ii. c. 22); it is true that he also says, 'etiam nec puto grave delictum in loco non licito hostes offendisse.'

PART IV. in Council with respect to a vessel which had been seized by a  
 CHAP. II.

French privateer, says that 'all foreign ships, when they are within the King's Chambers, being understood to be within the places intended in these directions' of James I, 'must be in safety and indemnity, or else when they are surprised must be restored to it, otherwise they have not the protection worthy of your Majesty<sup>1</sup>.' Philip II, so early as 1563, had published an edict forbidding, under pain of death, that any violence should be done to his subjects or allies, whether for reason of war or for any other cause, within sight of shore. The Dutch, after acquiring their independence, made a like decree<sup>2</sup>; and several treaties exist in which it was stipulated that the rights of sovereignty should be enforced by neutral nations for the benefit of an injured belligerent<sup>3</sup>.

How far  
they were  
observed.

But the history of the century bristles with occurrences which show how little the doctrine had advanced beyond the stage of theory. In 1627, the English captured a French ship in Dutch waters; in 1631, the Spaniards attacked the Dutch in a Danish port; in 1639, the Dutch were in turn the aggressors, and attacked the Spanish fleet in English waters; again in 1666, they captured English vessels in the Elbe, and in spite of the remonstrances of Hamburg and of several other German states did not restore them; in 1665, an English fleet endeavoured to seize the Dutch East India squadron in the harbour of Bergen, but were beaten off with the help of the forts; finally, in 1693, the French attempted to cut

<sup>1</sup> Wynne, *Life of Sir Leoline Jenkins*, ii. 780.

<sup>2</sup> Bynkershoek, *Quæst. Jur. Pub.*, lib. i. c. viii.

<sup>3</sup> Art. xxi. of the Treaty of Breda (1667) declares: '*Item, si qua navis aut naves, quæ subditorum aut incolarum alterutrius partis aut neutralis alicujus fuerint, in alterutrius portibus a quovis tertio capiantur, qui ex subditis et incolis alterutrius partis non sit; illi, quorum in portu aut ex portu aut quacunque ditione prædictæ naves captæ fuerint, pariter cum altera parte dare operam tenebuntur in prædictis nave vel navibus insequendis et reducendis, suisque dominis reddendis; verum hoc totum fiet dominorum impensis, aut eorum quorum id interest.*' Dumont, vii. i. 47. Like provisions were contained in the treaties made between the United Provinces and England in 1654 and 1661, and France in 1662.

some Dutch ships out of Lisbon, and on being prevented by the guns of the place from carrying them off, burnt them in the river<sup>1</sup>. PART IV.  
CHAP. II.

In the eighteenth century the principle of sovereignty was on the whole better respected. In 1759, when Admiral Boscawen pursued a French squadron into Portuguese waters and captured two vessels, the government of Portugal, though perfectly indifferent in fact, was obliged to demand reparation in order to avoid embroilment with France; and as full reparation by surrender of the vessels was not exacted, France subsequently alleged that the neutrality of Portugal was fraudulent, and grounded her declaration of war in 1762 in part upon the occurrence. Progress nevertheless was slow, as is sufficiently testified by the following passage in a memorial respecting a proposed augmentation of the land forces of the United Provinces, which was presented to the States-General by the Princess Regent in 1758. 'This augmentation,' she says, 'is the more necessary, as it behoves the state to be able to hinder either army from retiring into the territory of the state if it should be defeated; for in that case the conqueror being authorised to pursue his enemy wherever he can find him would bring the war into the heart of our own country<sup>2</sup>.'

§ 210. In the course of the eighteenth century, opinion ripened greatly as to the due relations of belligerents and neutral states. It was not strong enough to form an adequate or consistent usage; but it adopted a few general principles

Growth of  
opinion  
in the  
eighteenth  
century.

<sup>1</sup> Bynkershoek, Quæst. Jur. Pub. lib. i. c. viii; Pepys's Diary, Aug. 19, 1665. It is significant of the view which was commonly taken of such acts that Pepys, with evident surprise, speaks of 'the town and castle, *without any provocation*, playing on our ships.' This surprise can have no reference to the agreement which is supposed to have been made by the English with the King of Denmark, for his silence shows that he was ignorant of its existence.

<sup>2</sup> Lord Stanhope's Hist. of England from the Peace of Utrecht, iv. 148, and Append. xxxiv; Ann. Register for 1758, p. 150. Bynkershoek (Quæst. Jur. Pub. lib. i. c. viii.) says, 'Ad summum largiendum est, proelio recens commisso, hostem fugientem persequi licere in alterius imperio.'

**PART IV.** with sufficient decision to afford the basis of a wholesome  
**CHAP. II.** rule of conduct. This progress was in part owing to text  
 writers, who formulated the best side of international practice  
 into doctrines, which from their definite shape, and their  
 alliance with natural law, seemed to be clothed with more  
 authority than was perhaps their due, and which soon came  
 to be acknowledged as standards of right.

Bynker-  
shoek.

Bynkershoek was the earliest writer of real importance, and few of his successors have equalled him in sense or insight. In his 'Quæstiones Juris Publici,' written in 1737, he says, 'I call those non-enemies who are of neither party in a war, and who owe nothing by treaty to one side or to the other. If they are under any such obligation they are not mere friends but allies . . . Their duty is to use all care not to meddle in the war . . . If I am neutral, I cannot advantage one party, lest I injure the other . . . The enemies of our friends may be looked at in two lights, either as our friends, or as the enemies of our friends. If they are regarded as our friends, we are right in helping them with our counsel, our resources, our arms, and everything which is of avail in war. But in so far as they are the enemies of our friends, we are barred from such conduct, because by it we should give a preference to one party over the other, inconsistent with that equality in friendship, which is above all things to be studied. It is more essential to remain in amity with both than to favour the hostilities of one at the cost of a tacit renunciation of the friendship of the other <sup>1</sup>.'

<sup>1</sup> 'Non hostes appello qui neutrarum partium sunt, nec ex foedere his illisve quicquam debent; si quid debeant, foederati sunt, non simpliciter amici. . . . Horum officium est omni modo cavere ne se bello interponant. . . . Si medius sim, alteri non possum prodesse, ut alteri noceam. . . . Crede amicorum nostrorum hostes bifariam considerandos esse, vel ut amicos nostros, vel ut amicorum nostrorum hostes. Si ut amicos consideres, recte nobis iis adesse liceret ope, consilio, eosque juvare, milite auxiliari, armis et quibuscunque aliis, quibus in bello habent. Quatenus autem amicorum nostrorum hostes sunt, id nobis facere non licet, quia sic alterum alteri in bello praeferremus, quod vetat aequalitas amicitiae, cui in primis studendum est. Praestat cum utroque amicitiam con-

Wolff, who wrote in 1749, calls those neutrals 'who adhere to the side of neither belligerent, and consequently do not mix themselves up in the war<sup>1</sup>.' They are in a state of amity with both parties, and owe to each whatever is due in time of general peace. Belligerents have therefore the right of unimpeded access to neutral territory, and of buying there at a fair price such things as they may want. This right, it is true, is qualified by the requirement that it shall be exercised for a *causa justa*, but war is a *causa justa*, and therefore the passage of troops is to be permitted.

Vattel, who published his work in 1758, says that neutrality consists in 'an impartial attitude so far as the war is concerned, and so far only; and it requires:—1st, that the neutral people shall abstain from furnishing help when they are under no prior obligation to grant it, and from making free gifts of troops, arms, munitions, or anything else of direct use in war. I say that they must abstain from giving help, and not that they must give it equally, for it would be absurd that a state should succour two enemies at the same moment. Besides, it would be impossible to do so equally; the very same things,—the same number of troops, the same quantity of arms, of munitions, &c., furnished under different circumstances, are not equivalent succour. 2nd, that in all matters not bearing upon the war a neutral and impartial nation shall not refuse to one of the parties, because of the existing quarrel, that which it accords to the other<sup>2</sup>.' Vattel

*servare, quam alteri in bello favere, et sic alterius amicitiae tacite renunciare.*  
*Quæst. Jur. Pub. lib. i. c. ix.*

<sup>1</sup> *Jus Gentium*, § 672.

<sup>2</sup> 'Un peuple neutre doit garder une impartialité . . . qui se rapporte uniquement à la guerre, et comprend deux choses: 1. Ne point donner de secours quand on n'y est pas obligé; ne fournir librement ni troupes, ni armes, ni munitions, ni rien de ce qui sert directement à la guerre. Je dis ne point donner de secours et non pas en donner également; car il serait absurde qu'un état secourût en même temps deux ennemis. Et puis il serait impossible de le faire avec égalité; les mêmes choses, le même nombre de troupes, la même quantité d'armes, de munitions, etc., fournies en des circonstances différentes ne forment plus de secours équivalents. 2. Dans tout ce qui ne regarde pas à la guerre, une nation neutre et impartiale ne refusera point à l'un des parties, à



PART IV. afterwards so far qualifies this sound general statement as to  
 CHAP. II. lay down that a country without derogating from its neutrality, may make a loan of money at interest to one of two belligerents, refusing a like loan to the other, provided the transaction between the states is of a purely business character<sup>1</sup>. The qualification is only of importance as tending to show in how narrow a sense Vattel would have been inclined to construe his own words.

It is to be observed that these authors, in dealing with conduct failing to satisfy the obligations of neutrals, speak only of acts done by the state itself with the express object of assisting a belligerent. They say nothing indicating how far in their view a nation was bound to watch over the acts of its subjects; and in practice this doctrine as to state conduct was controlled by the action of treaties.

Practice  
of the  
eighteenth  
century as  
to troops  
furnished  
under  
treaty by  
a neutral  
state to a  
belligerent.

§ 211. It was clearly open to a state, without abandoning its position of neutrality, to supply a body of troops to a belligerent under a treaty between the two powers, either for mutual help, or for succour to be given by one only to the other in the event of a war which might be in contemplation by an intending belligerent at the very moment of concluding the treaty. Agreements of this kind were often made, and were sometimes guarded against by express stipulation. In 1727, when England was already in a state of informal war with Spain, the Landgrave of Hesse Cassel agreed to provide her with 12,000 troops 'whenever they should be wanted<sup>2</sup>.' One of the most marked instances of the practice is furnished by the conduct of the United Provinces during the war of the Austrian Succession. Under their guarantee of the Pragmatic Sanction they sent in 1743 an auxiliary corps of 20,000 men to the assistance of Maria

*raison de sa querelle présente, ce qu'elle accorde à l'autre.* Droit des Gens, liv. iii. c. vii. § 104. See also Barbeyrac, note to Pufendorf, bk. viii. c. vi, and Burlamaqui, Principles of Natural and Politic Law, trans. by Nugent, vol. ii. pt. iv. c. viii.

<sup>1</sup> Liv. iii. c. vii. § 110.

<sup>2</sup> Dumont, viii. ii. 141.

Theresa, and they gradually so engaged with their whole force in the active operations of the war that the brilliant campaign of Marshal Saxe in 1746 left them destitute of an army. Nevertheless, when in the next year the French forces entered Holland, a Royal Declaration announced that the invasion was solely intended to put a stop to the effects of the protection given to the English and Austrian armies by the Republic, 'sans rompre avec elle<sup>1</sup>.' Piedmont engaged in like manner in the same war; and England in it, as in the Seven Years' War and that of American Independence, drew large bodies of troops from neutral German states under treaty with their sovereign<sup>2</sup>. Bynkershoek says, 'What if I have promised help to an ally, and he goes to war with my friend? I think that I ought to stand by my promise, and that I can do so properly.' The neutral may however abstain when the war has been undertaken unjustly on the part of his ally; and when it is once begun no new engagement must in any case be entered into<sup>3</sup>.

It was not until 1788 that the right of a neutral state to give succour under treaty to a belligerent gave rise to serious, if to any, protest. Denmark, while fulfilling in favour of Russia an obligation of limited assistance contracted under treaty, declared itself to be in a state of amity with Sweden. The latter power acquiesced as a matter of convenience in the continuance of peace, but it placed on record a denial that the conduct of Denmark was permissible under the Law of Nations<sup>4</sup>. Probably Sweden stood almost alone in her view as to the requirements of neutral duty. In 1785, the United States agreed with Prussia that 'neither one nor the other of the two states would let for hire, or lend, or give any part of its naval or military forces to the enemy of the

<sup>1</sup> Martin, Hist. de France, lib. xcv. § ii.

<sup>2</sup> Lord Stanhope, Hist. of England, vol. iii. 144, vol. iv. 49, and vol. vi. 86; De Martens, Rec. ii. 417 and 422.

<sup>3</sup> Quæst. Jur. Pub. lib. i. c. ix.

<sup>4</sup> The declaration and counter declaration are quoted in full by Phillimore, iii. § cxi.

PART IV. other to help it or to enable it to act offensively or defensively  
 CHAP. II. against the belligerent party' to the treaty; and in 1780 a  
 similar treaty had been concluded between England and Denmark<sup>1</sup>. It is needless to repeat that positive covenants are not inserted in treaties merely to embody obligations which without them would be of equal stringency; and the continuance of the old practice is proved by the conclusion of a treaty in 1788 under which the Duke of Brunswick contracted to supply Holland with 3,000 men, and of another in the same year with a like object between Holland and Mecklenburg-Schwerin<sup>2</sup>.

As to  
 levies in  
 a neutral  
 state made  
 apart from  
 treaty.

It is more doubtful whether the levy of troops by belligerents on their own account within neutral territory was still recognised by custom, when allowed apart from treaty to both parties indifferently. Bynkershoek says, 'I think that the purchase of soldiers among a friendly people is as lawful as the purchase of munitions of war<sup>3</sup>;' they would merely be subject to capture like other contraband articles on their way to the belligerent state. Vattel in somewhat inconsistent language probably intends to give the same liberty<sup>4</sup>. But there are a few treaties to the contrary effect between some of the most important powers. England and

<sup>1</sup> Elliot, *American Diplomatic Code*, i. 347; Chalmers, *Collection of Treaties*, i. 97.

<sup>2</sup> De Martens, *Rec.* iv. 349 and 362.

<sup>3</sup> 'Quod juris est in instrumentis bellicis, idem esse puto in militibus apud amicum populum comparandis.' *Quæst. Jur. Pub. lib. i. cap. xxii.*

In the usually sensible *Derecho Internacional* of Pando (written in 1838) is a curious instance of the tendency of a doctrine, once sanctioned by a writer of authority, to perpetuate itself, like an organ which has become useless, and only remains in a rudimentary state to attest an epoch of lower development. He almost repeats the words of Bynkershoek: 'Los hombres deben considerarse como artículo de guerra, en que es libre à todas naciones comerciar de la misma manera que en los otros, y con iguales restricciones.' (§ clxxxix.) In the particular case the doctrine is too much out of harmony with modern opinion to do mischief; but it is only an unusually glaring example of a common, and—as text writers are quoted in international controversy—a dangerous practice.

<sup>4</sup> *Droit des Gens*, liv. iii. c. vii. § 110. His qualification that troops may be levied in a neutral state—'à moins qu'elles ne soient données pour envahir les

Holland were both reciprocally bound with France by the PART IV.  
Treaties of Utrecht to prevent their subjects from accepting CHAP. II.  
commissions in time of war from the enemies of whichever  
might be engaged in hostilities; a treaty of the year 1670  
of the same nature was still in force between England and  
Denmark; and in 1725 Spain entered into a like engagement  
with the Empire<sup>1</sup>. When troops were wanted they seem to  
have been generally, if not always, obtained under treaty;  
England and Holland for municipal reasons enacted laws  
expressly to restrain their subjects from entering the service  
of foreign states; and the neutrality edicts of the two Sicilies  
in 1778, and of Venice and the Papal States in 1779, forbid  
enlistment with a belligerent under pain of exile or imprison-  
ment<sup>2</sup>. The old practice may therefore be taken to have  
fallen into desuetude, and perhaps to have become illegal.

The equipment by private adventure of cruisers to be em- As to  
ployed under letters of marque in the service of a belligerent cruisers  
is an act analogous to the levy of a body of men in aid of fitted out  
his land force, but from the conditions of marine warfare by neu-  
it is more mischievous to his enemy. A better defined rule trals.  
might therefore be expected to exist with regard to it. Per-  
haps, on the whole, this was the case; but the dispute be- 1777. Dis-  
tween England and France in 1777 shows that it would be pute be-  
easy to overvalue the significance of facts tending to show tween  
such adventures to be illegal under the common law of nations. England  
During the correspondence between the two governments and France.  
with reference to the covert help afforded to the American  
insurgents in France, M. de Vergennes admitted that France  
was bound to prevent ships of war from being armed and

*états*'—of the opposite belligerent, and provided that they are not too  
numerous, takes away with one hand what he gives with the other.

<sup>1</sup> Dumont, viii. i. 348 and 378; vii. i. 136; and viii. ii. 115.

<sup>2</sup> 9 Geo. II. c. 30, and 29 Geo. II. c. 17. For comments on the intention of  
these acts, see *Debates on the Foreign Enlistment Act*, Hansard, xl. (1819);  
De Martens, Rec. iii. 47, 53, 74. Bynkershoek (*Quæst. Jur. Pub. lib. i. cap.*  
*xxii*) says that in his day most states permitted their subjects to enter foreign  
service.

**PART IV.** manned with French subjects within its territory to cruise  
**CHAP. II.** against England. But in this instance, and in all the controversy of that time between the two nations, the demands of one party and the admissions of the other were alike based upon obligations under the Treaties of Utrecht and of Paris. It is not probable that England in her frequent Notes and her elaborate 'Mémoire Justificatif' would have refrained from supporting the special obligations of treaties by the authority of general law had she thought that its voice would be distinct enough for her purpose<sup>1</sup>. Yet she had occasion to complain of acts which in the present day would seem to be of extraordinary flagrancy. The Reprisal, an American privateer, sailed from Nantes to cruise against the English. She returned to L'Orient, sold her prizes, and took in reinforcements of men. She then again cruised in company with a privateer which had been armed at Nantes, and was manned solely by Frenchmen; and fifteen ships captured by the two vessels were brought into French ports and sold.

Neutrality  
edicts.

The evidence tending to show that general opinion already looked upon the outfit and manning of cruisers by private persons as compromising the neutrality of a state, mainly consists in the neutrality edicts which were issued shortly after this time on the outbreak of actual war between England and France. Venice, Genoa, Tuscany, the Papal States, and the Two Sicilies, subjected any person arming vessels of war or privateers in their ports to a fine; and in 1779

<sup>1</sup> De Martens, *Causes Célèbres*, iii. 152. The fifteenth article of the Treaty of Commerce of Utrecht declares that 'il ne sera pas permis aux armateurs étrangers, qui ne seront pas sujets de l'une ou de l'autre couronne, et qui auront commission de quelque autre Prince ou État ennemi de l'un et de l'autre, d'armer leurs vaisseaux dans les ports de l'un et de l'autre des deux royaumes, d'y vendre ce qu'ils auront pris, . . . ni d'acheter même d'autres vivres que ceux qui leur seront nécessaires pour parvenir au port le plus prochain du Prince dont ils auront obtenu des commissions.' Dumont, viii. l. 348. The stipulations of the Treaty of Utrecht were revived by the Treaty of Paris. The absence of reference to the authority of general law rather than to treaty stipulations is the more significant that the above article evidently fails to cover the acts complained of.

the States-General of the United Provinces issued a placard reciting that it was suspected that subjects of the state had equipped and placed on the sea armed vessels under a belligerent flag, and declaring such 'conduct to be contrary to the law of nations, and to the duties binding on subjects of a neutral power<sup>1</sup>.'

PART IV.  
CHAP. II.

§ 212. Ten years later De Martens summed up the duties of neutrality as follows. 'It is necessary,' he says, 'for the observance of complete neutrality to abstain from all participation in warlike expeditions. . . . But can a power, without overstepping the bounds of neutrality, allow its subjects to accept letters of marque from a belligerent? In strictness, it would seem that it cannot. Treaties of commerce often contain an express promise not to accord any such permission.' He adds that a state which sends succour in troops or in money to one of the two belligerents 'can no longer in strictness demand to be looked upon as a neutral,' although in the case of pre-existent treaties it is 'the custom to regard it as such<sup>2</sup>.' It has been remarked by Kent that De Martens attached exaggerated importance to treaties, and in this case it would seem to be mainly on their authority that he declares neutrality to be inconsistent with the acceptance by neutrals of letters of marque. And, after all, his doctrine is expressed with some hesitation. Both applications of his general principles are carefully limited by the words '*à la rigueur*.' Custom in these matters was growing; it was not yet established.

Neutral  
duty at the  
end of the  
eighteenth  
century  
according  
to De  
Martens.

§ 213. The United States had the merit of fixing it

<sup>1</sup> De Martens, Rec. iii. 25, and 47, 53, 62, 74. It appears however from a recital in the Treaty of 1787 between Russia and the Two Sicilies that subjects of the latter power were forbidden both in time of war and peace to build ships for, or to sell them to, foreigners; and that they were also forbidden to buy them without express permission. Id. iv. 240. On the other hand, the Venetian government expressly refers to its wish to observe '*la più esatta ed imparziale neutralità*;' but the provisions of the edict go in several respects further than can be required by law as it now is.

<sup>2</sup> Précis du Droit des Gens, § 264, 265, and note to latter section, ed. 1788. The later editions are modified.

PART IV. permanently. On the outbreak of war in Europe in 1793, a  
 CHAP. II. newly-appointed French Minister, M. Genêt, on landing at  
 1793. Neu- Charlestown, granted commissions to American citizens who  
 trality fitted out privateers and manned them with Americans to  
 policy of cruise against English commerce. Immediate complaint was  
 the United States. made by the English Minister, who expressed his 'persuasion  
 that the government of the United States would regard the  
 act of fitting out these privateers in its ports as an insult  
 offered to its sovereignty<sup>1</sup>.' The view taken by the American  
 government was in fact broader, and Mr. Jefferson expressed  
 it clearly and tersely in writing to M. Genêt, 'that it is  
 the right of every nation to prohibit acts of sovereignty from  
 being exercised by any other within its limits, and the duty  
 of a neutral nation to prohibit such as would injure one of  
 the warring powers; that the granting military commissions<sup>2</sup>  
 within the United States by any other authority than their  
 own is an infringement of their sovereignty, and particularly  
 so when granted to their own citizens to lead them to  
 commit acts contrary to the duties they owe to their country<sup>3</sup>.'  
 Somewhat later he writes to Mr. Morris, American Minister  
 in Paris, 'that a neutral nation must in all things relating to  
 the war observe an exact impartiality towards the two parties  
 . . . that no succour should be given to either, unless  
 stipulated by treaty, in men, arms, or anything else directly  
 serving for the war; that the right of raising troops being  
 one of the rights of sovereignty, and consequently appertain-  
 ing exclusively to the nation itself, no foreign power or  
 person can levy men within its territory without its consent;  
 that if the United States have a right to refuse the per-  
 mission to arm vessels and raise men within their ports and  
 territories, they are bound by the laws of neutrality to  
 exercise that right and to prohibit such armaments and

<sup>1</sup> Mr. Hammond to Mr. Jefferson, June 7, 1793.

<sup>2</sup> M. Genêt maintained that to grant commissions and letters of marque was one of the usual functions of French consuls in foreign ports.

<sup>3</sup> June 5, 1793. American State Papers, i. 67.

enlistments<sup>1</sup>. Taking this language straightforwardly, without forcing into it all the meaning which a few phrases may bear, but keeping in mind the facts which were before the eyes of Mr. Jefferson when he penned it, there can be no doubt that the duties which it acknowledges are the natural if not inevitable deductions from the general principles stated by Bynkershoek, Vattel, and De Martens; and there can be as little doubt that they had not before been frankly fulfilled. To give effect to the views then stated, instructions were issued to the collectors of customs scheduling 'rules concerning sundry particulars which have been adopted by the President as deductions from the laws of neutrality established and received among nations.' Under these, 'equipments of vessels in the ports of the United States which are of a nature solely adapted for war,' and the enlistment of 'inhabitants' of the United States, were forbidden. On the other hand, it was permitted to furnish merchant vessels and ships of war with equipments of doubtful nature, as applicable either to war or commerce<sup>2</sup>. The trial of Gideon Henfield for cruising in one of the privateers commissioned by M. Genêt soon proved that the existing law was not strong enough to enable the government to carry out neutrality in the sense in which they defined it<sup>3</sup>. An Act was accordingly passed by Congress to prevent citizens or inhabitants of the United States from accepting commissions or enlisting in the service of a foreign state, and to prohibit the fitting out and arming of cruisers intended to be employed in the service of a foreign belligerent, or the reception of any increased force by such vessels when armed<sup>4</sup>.

The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There

<sup>1</sup> Aug. 16, 1793. American State Papers, i. 116.

<sup>2</sup> Appendix iii. to Report of Neutrality Law Commissioners, 1868.

<sup>3</sup> Wharton's State Trials, p. 49.

<sup>4</sup> Statutes at Large of the United States, ed. by Peters, i. 381.



PART IV. can be no doubt that it was intended and believed to give  
CHAP. II. effect to the obligations then incumbent upon neutrals. But  
it represented by far the most advanced existing opinions as  
to what those obligations were; and in some points it even  
went further than authoritative international custom has up  
to the present time advanced. In the main however it is  
identical with the standard of conduct which is now adopted  
by the community of nations.

## CHAPTER III.

### THE EXISTING LAW AFFECTING BELLIGERENT AND NEUTRAL STATES.

§ 214. FROM the somewhat incoherent practice followed by PART IV. belligerents and neutrals with respect to each other during CHAP. III. the eighteenth century, three principles disengage themselves with clearness. The neutral state was bound not to commit any act favouring one of two belligerents in matters affecting their war, and it was in turn incumbent on belligerents to respect the sovereignty of the neutral. It was also recognised, though less fully, that it is the duty of a state to restrain foreign governments and private persons from using the territory and resources of a country for belligerent purposes. In these principles are involved every obligation under which a neutral state can lie, and almost every right the possession of which is important to it. But the foregoing sketch has shown that they were not always observed, and still more that they were not made to yield all the results which logically flow from them. Those results which were in fact reached were not entirely consistent with each other.

General principles of the law of neutrality as ascertained at the end of the eighteenth century.

During the present century expansion of trade and quick-ness of communication have given birth in certain directions to new difficulties in the relations of neutrals and belligerents, while at the same time the vitality of some of the older customs has never been tested in action. Hence a certain number of doctrines appear to survive which can hardly in any true sense be said to live ; and on the other hand, new applications of the old principles have continually to be made

Their relation to modern doctrine.

PART IV. to complex facts, in dealing with which there is no strict  
 CHAP. III. precedent, and sometimes a very doubtful analogy. The  
 — most convenient mode therefore of treating the present relations of neutral and belligerent states will be, after clearing away a few cases of effete doctrine, to take the applications of the principles which have been laid down in the order of their complexity. In the principles themselves there is never any difficulty; the only question to be answered is, whether or not they ought to be applied to a certain state of facts.

Whether  
troops can  
be furnish-  
ed under  
treaty.

§ 215. Although, during the present century, no nation has given military assistance to an ally while professing to maintain neutrality, and although no government would probably now venture to conclude a treaty with that object, there are text writers, recent or of existing authority, in whose works the opinion lingers, that a treaty made before the outbreak of war justifies the gift of such assistance and shelters the neutral from the consequences of his act.

According to Manning, the custom is 'directly at variance with the true basis of neutrality, but it has now been established by the habitual and concurrent practice of states, and is at the present day an undisputed principle of the European law of nations.' Kent and Wheaton are equally positive as to the law and more blind as to the moral aspect of the case; and the doctrine is reasserted in the more modern work of M. Bluntschli<sup>1</sup>.

It is impossible to ignore the authority of these writers, but they cite no later precedent than that of the Danish loan of troops to Russia in 1788; it is even doubtful whether the facts of that case are not more against than in favour of the conclusion which they are brought to establish; and no nation is now bound by any like obligation. The usage is not therefore upheld by continuing practice, and it is not in conformity with legal principle, by which, or by

<sup>1</sup> Manning, p. 225; Kent, Comm. lect. vi; Wheaton, Elem. pt. iv. chap. iii. § 5; Bluntschli, § 759.

practice, it could alone be rendered authoritative. It is granted that the acts contemplated would, apart from prior agreement, be a violation of neutrality as now understood, and it is unnecessary to argue that a prior agreement in no way affects the character of acts with reference to a non-consenting third party<sup>1</sup>.

§ 216. It is usually said that a loan of money to one of the belligerent parties is a violation of neutrality<sup>2</sup>. That it is so, if made or guaranteed by the neutral state, is abundantly evident. But it is difficult to understand why modern writers repudiate analogy and custom by condemning the negotiation of a loan by neutral subjects under ordinary mercantile conditions. M. Bluntschli says that the neutral state must abstain from making loans for purposes of war, and adds that the rule is equally applicable to loans negotiated by private persons. Sir R. Phillimore uses language not easily to be reconciled with his emphatic assertions of the right of a neutral subject to trade. Calvo, while agreeing that loans during war are illicit, will not admit that the neutral government is able so to control the acts of individuals in such matters as to be held responsible for their consequences<sup>3</sup>. But outside the boards of works on International Law a

PART IV.  
CHAP. III.Whether  
loans by  
neutral  
individuals  
are per-  
missible.

<sup>1</sup> The above view is taken by Phillimore, vol. iii. § cxxxviii; Calvo, § 1062; and Heffter, § 117.

<sup>2</sup> Formerly neutrals seem occasionally to have acted under the impression that it is so, and the language of modern books may be founded upon the unnecessary responsibilities which some states may have assumed. In 1795 'le comité de salut public, croyant que la paix conclue avec l'Espagne lui donnerait plus de crédit à l'étranger, imagina de contracter un emprunt pour mettre l'armée d'Italie en état de reprendre l'offensive, et le ministre Villars fut autorisé à ouvrir des négociations dans Gênes à ce sujet. Un mois s'écoula dans l'attente des premiers versements; enfin le Sénat, se retranchant derrière sa neutralité, refusa formellement son autorisation.' Koch, *Mém. de Massena*, i. 220.

<sup>3</sup> Bluntschli (§ 768), Phillimore (iii. § clvii), Calvo (§ 1060). Wheaton, Manning, De Martens, Klüber, Heffter and Twiss make no mention of loans, whether by the sovereign or by subjects. Kent merely says that 'a loan of money to one of the belligerent parties is considered to be a violation of neutrality;' but it does not appear whether this language is intended to include private as well as public loans.

PART IV. healthier rule is unquestioned. A modern belligerent no  
CHAP. III. more dreams of complaining because the markets of a neutral  
— nation are open to his enemy for the purchase of money, than  
because they are open for the purchase of cotton. The reason  
is obvious. Money is in theory and in fact an article of  
commerce in the fullest sense of the word. To throw upon  
neutral governments the obligation of controlling dealings  
in it taking place within their territories would be to set up  
a solitary exception to the fundamental rule that states are  
not responsible for the commercial acts of their subjects.  
And not only would the existence of such an exception be  
unwarranted by anything peculiar in the nature of money,  
which is certainly not more noxious than munitions of war,  
but it would burden states with a responsibility which they  
would be wholly unable to meet. Money is a merchandise  
the transmission of which would elude all supervision. Loans  
need not be handed over in specie; it is possible that payment  
might be made in bills not one of which might enter the  
neutral country in which the contract is made; and if it were  
attempted to stop the practice by penalties, nothing would be  
more easy than for the real lenders to conceal themselves  
behind names borrowed in the country of the belligerent  
debtor. The true law on the subject was laid down by  
Mr. Webster in 1842 with a decision, and in language,  
which indicate how clear and invariable the practice of  
nations is. 'As to advances and loans,' he says, 'made by  
individuals to the government of Texas or its citizens, the  
Mexican government hardly needs to be informed that there  
is nothing unlawful in this, so long as Texas is at peace with  
the United States, and that these are things which no  
government undertakes to restrain <sup>1</sup>.'

<sup>1</sup> Mr. Webster to Mr. Thompson, Executive Documents, 27th Congress, 1841-2. The dictum of Lord Wynford in *De Wütz v. Hendricks*, on which Sir R. Phillimore relies as expounding the view of the English courts, merely expresses his opinion that it is 'contrary to the law of nations for persons residing in this country to enter into engagements by way of loan *for the purpose of supporting* subjects of a foreign state in arms against a government in

§ 217. The general principle that a mercantile act is not a violation of a state neutrality, is pressed too far when it is made to cover the sale of munitions or vessels of war by a state. Trade is not one of the common functions of a government; and an extraordinary motive must be supposed to stimulate an extraordinary act. The nation is exceptionally unfortunate which is forced to get rid of surplus stores precisely at the moment when their purchase is useful to a belligerent. In the year 1825, the Swedish government, wishing to reduce its navy, offered six frigates for sale to the government of Spain. The latter refused to buy, and three of them were then sold to an English mercantile firm, who, as it afterwards appeared, were probably acting on behalf of Mexico, then in revolt against the mother country. In any case it became known before the vessels were handed over that a further sale had been or was about to be effected to the recognised Mexican agent in England; and the Swedish government, listening to the warmly expressed complaints of Spain, rescinded the contract at some monetary loss to itself, notwithstanding that the ships had been sold in ignorance of their ultimate destination<sup>1</sup>. During the war between France and Prussia, the government of the United States seems to have taken an opposite view of its duty<sup>2</sup>; but there can be no question that Sweden, in yielding, chose the better part. The vendor of munitions of war in large quantities during the existence of hostilities knows perfectly well that the purchaser must intend them for the use of one of the belligerents, and a neutral government is too strictly

PART IV.  
CHAP. III.

Whether  
the sale of  
articles of  
warlike  
use by a  
neutral  
state is per-  
missible.

alliance with our own.' ix Moore, 586. During the Franco-German war both the French Morgan Loan and part of the North German Confederation Loan were issued in England.

<sup>1</sup> De Martens, *Causes Cél.* v. 229.

<sup>2</sup> A series of public sales of surplus guns, rifles, and other arms took place at New York. Large quantities were bought by French agents, were taken on board French ships direct from the arsenal at Governor's Island, and were paid for through the French consul. Mr. Thornton to Lord Granville, 1863; *State Papers*, lxxi. 202. On the general question comp. Ortolan, ii. 182.

PART IV. bound to hold aloof from the quarrel to be allowed to seek  
 CHAP. III. safety in the quibble that the precise destination of the  
 — articles bought has not been disclosed.

Limits of  
 the duty  
 to prohibit  
 the levy of  
 men with-  
 in neutral  
 territory.

§ 218. The principle that it is incumbent on the neutral sovereign to prohibit the levy of bodies of men within his dominions for the service of a belligerent, which was gradually becoming authoritative during the eighteenth century, is now fully recognised as the foundation of a duty. And its application extends to isolated instances when the circumstances are such as to lead to serious harm being done to a friendly nation. The acceptance of letters of marque by neutral subjects from a belligerent is now prohibited by international common law, and is always forbidden by the neutral sovereign<sup>1</sup>, although from several points of view the act is unobjectionable. An individual may abandon his country and take service with a foreign state; the foreign state is free to accept his services. But in accepting a letter of marque he does not cut himself off from his own state. It is able to lay hands on him; and that ability is enough to fix it with responsibility.

On the other hand, a state is not expected to take precautions against the commission of microscopic injuries<sup>2</sup>. The true limits of neutral care as regards individuals were indicated in the Proclamations of Neutrality issued by England in 1861 and 1870. At the outbreak of the American Civil War it was thought possible that large numbers of English subjects might engage in it, and an express prohibition of such service was therefore inserted in the Proclamation. In that issued at the beginning of the war between France and Germany the prohibition was omitted, it not being likely

<sup>1</sup> E. g. see Proclamations of Neutrality issued by Austria, France, Italy, Spain, and the Netherlands, Append. iv. to Report of Neutrality Law Commissioners, 1868; and the Spanish Proclamation of 1870, D'Angeberg, No. 254. Formerly treaties with respect to letters of marque were very common; for the last forty years it has only been thought necessary to make them with South American States.

<sup>2</sup> Calvo, § 1055; Heffter, § 145.

that any sufficient number to justify government action would be found in the ranks of either army<sup>1</sup>. As a matter of fact a few English served as officers in both the German and French armies, without the neutrality of Great Britain being in any way supposed to be compromised.

PART IV.  
CHAP. III.

It is scarcely an exception from the general prohibition to make levies in a neutral state that a belligerent ship entering a neutral port with a crew reduced from whatever cause to a number less than that necessary to her safe navigation may take on board a sufficient number of men to enable her to reach a port of her own country. In doing this, and no more, she does not become capable of being used as an engine of war, and consequently does nothing which the neutral state is bound to prevent as inconsistent with its neutrality. The matter of course stands otherwise if the limits of bare necessity are passed.

§ 219. During the eighteenth century it was an undisputed doctrine that a neutral state might grant a passage through its territory to a belligerent army, and that the concession formed no ground of complaint on the part of the other belligerent. The earlier writers of this century, and Sir R. Phillimore more lately, preserve this view, only so far modifying it as to insist with greater strength that the privilege, if accorded, shall be offered impartially to both belligerents<sup>2</sup>. But the most recent authors assert a contrary opinion<sup>3</sup>; no direct attempt has been made since 1815 to take advantage of the asserted right; and the permission granted to the allies in that year to cross Switzerland in order to invade France was extorted from the Federal Council under circumstances which would in any case rob the precedent of authority<sup>4</sup>.

Whether  
a neutral  
state may  
permit a  
belligerent  
force to  
pass  
through its  
territory.

<sup>1</sup> Hansard, 3rd Series, vol. cciii. 1098.

<sup>2</sup> De Martens, Précis, § 310; Kent, lect. vi; Klüber, § 284; Manning, p. 245; Wheaton, Elem. pt. iv. c. iii. § 8; Phillimore, iii. § clii. Pando (§ cxc) follows Vattel in saying that in cases of extreme necessity the belligerent may effect his passage even against the will of the neutral.

<sup>3</sup> Heffter, § 147; Bluntschli, § 770; Calvo, § 1074; Negrin, p. 173.

<sup>4</sup> Wheaton, Elem. pt. iv. chap. iii. § 4.



PART IV. The same country in 1870 denied a passage to bodies of  
CHAP. III. — Alsatians, enlisted for the French army, but travelling without arms or uniforms<sup>1</sup>; and there can be no question that existing opinion would imperatively forbid any renewed laxity of conduct in this respect on the part of neutral countries. Passage for the sole and obvious purpose of attack is clearly forbidden. The grant of permission is an act done by the state with the express object of furthering a warlike end, and is in its nature an interference in the war. It is therefore a non-neutral act; and the only excuse which can be accepted for its performance would be the impossible one that it is equally advantageous to, and desired by, both belligerents at once.

A broad distinction is however to be drawn between a grant of passage for a specific purpose in time of war, and a grant of passage made in time of peace to enable a state to reach an outlying portion of its territory, or to enable it to reach its possession with more ease than would otherwise be practicable. In the former case the grant, as has been seen, is essentially un-neutral; in the latter it is essentially colourless when made; and if by the occurrence of a war which happens to touch the outlying territory its effects become injurious to one of the two belligerents, the result is an accidental and possibly an unforeseen one. It is difficult to separate the harmless use of the neutral territory for mere garrison purposes from its use for belligerent purposes; and if the former use has been habitual, and especially if it has been secured by treaty, it probably could not be fairly held that the neutral state is guilty of un-neutral conduct in allowing the passage of troops during war. Its behaviour would however require to be judged by the circumstances of the case; a hard and fast line could scarcely be drawn; and while a rigid limitation of the force permitted to pass to the amount of the ordinary reliefs might be the equivalent of handing over the detached territory to the enemy, the

<sup>1</sup> Bluntschli, § 770.

grant of passage to greatly more than the usual numbers might be as definitely un-neutral an act as a grant made solely for the purposes of the war. PART IV.  
CHAP. III.

With the passage of troops in an organised condition across neutral territory, and as illustrating the advantages which a belligerent might reap from such passage, may be mentioned an ingenious attempt which was made by Germany in 1870 to use Belgian territory, under a plea of humanity, to facilitate the operations of war. After the battle of Sedan, the victorious army was embarrassed by masses of wounded, whom it was difficult to move into Germany by the routes which were open, and whose support in France in part diverted the commissariat from its normal function of feeding the active army. The German government therefore applied to Belgium for leave to transport the wounded across that country by railway. In consequence of the strong protest of France, Belgium after consultation with the English government, rejected the application. It is indeed difficult to see, apart from the grant of direct aid or of permission to move a corps d'armée from the Rhine Provinces into France, in what way Belgium could have more distinctly abandoned her neutrality than by relieving the railway from Nancy to the frontier from encumbrances, by enabling the Germans to devote their transport solely to warlike uses, and by freeing the commissariat from the burden of several thousand men lodged in a place of difficult access. Analogous  
use of  
neutral  
territory.

§ 220. It has been already seen that the commission of hostilities within neutral territory was the earliest subject of legal restraint. Their prohibition was so necessary a consequence of the doctrine of sovereignty, and is so undisputed a maxim of law, that it would be superfluous to recur to the subject were it not that aberrations in practice have been more common than in any other matter connected with neutrality in which the rule is so clear. In 1793 the French frigate *Modeste* was captured in the harbour of Genoa by two English men of war; and it was neither restored nor was any apology Hostilities  
committed  
within  
neutral  
territory.

PART IV. made for the violation of Genoese neutrality<sup>1</sup>. But in the same  
 CHAP. III. year the American government acted upon this law by causing  
 — the restoration of the ship *Grange*, seized in Delaware Bay; and the English Courts gave effect to it by voiding a capture which took place within the mouths of the Mississippi<sup>2</sup>. The principle upon which the closely allied act of issuing from neutral ground for an immediately hostile end is interdicted was laid down by Lord Stowell in a case in which an English frigate lying within Prussian waters sent out its boats to make captures among vessels anchored in the neighbouring roads at the entrance of the Dollart.

Use of  
 neutral  
 territory  
 by a belli-  
 gerent as  
 a base of  
 operations.

§ 221. Much the larger number of cases in which the conduct of a neutral forms the subject of complaint is when a belligerent uses the safety of neutral territory to prepare the means of ultimate hostility against his enemy, as by fitting out expeditions in it against a distant objective point, or by rendering it a general base of operations. In many such cases the limits of permissible action on the part of the belligerent, and of permissible indifference on the part of the neutral, have not yet been settled. Generally the neutral sovereignty is only violated constructively. The acts done by the offending belligerent do not involve force, and need not entail any interference with the supreme rights of the state in which they are performed. They may be, and often are, innocent as regards the neutral except in so far as they endanger the quiescence of his attitude towards the injured belligerent; and their true quality may be, and often is, perceptible only by their results.

At the root of this class of cases lies the principle that a neutral state cannot allow its territory to become a scene of hostile operations to the disadvantage of one of two belli-

<sup>1</sup> Botta, *Storia d'Italia*, i. 161 and 192. See also the case already mentioned of the Swedish vessels seized at Oster Risør (p. 71); that of the General Armstrong in 1814 (p. 548); and that of the Florida, captured in Bahia Bay by the Wachusett in 1864 (p. 544).

<sup>2</sup> Mr. Jefferson's letter to M. Ternant, *Am. State Papers*, i. 77; *The Anna*, v Robinson's Admiralty Reports, 373.

gerents. The extension of this principle to acts of hostility taking their commencement in neutral ground and leading to immediate violence, which was made by Lord Stowell, is equally applicable to acts the completion of which is more remote in point of time or place, but which have been as fully prepared within the neutral territory. All such acts must be offences against the neutral on the part of the belligerent performing them; and if knowingly permitted by the neutral they are offences on his part against the belligerent for whose injury they are intended. Ordinarily their identification presents little difficulty. There could be no question as to the nature of the filibustering expeditions from the United States, of those which fed the Cretan insurrection, or of the Fenian incursions into Canada; and there can be as little question that the conduct of the Greek and American governments presented examples of grave deviations from the spirit of the rule of neutrality and from the letter of that which guides nations in time of general peace. In cases of this kind the neutral country is brought under the common military definition of a base of operations; it becomes the territory 'from which an army' or a naval force 'draws its resources and reinforcements, that from which it sets forth on an offensive expedition, and in which it finds a refuge at need<sup>1</sup>.'

But there are some cases in which the question whether a neutral territory is so converted by a belligerent into a base of operations as to affect the neutral state with responsibility is not so readily answered. An argument placed before the Tribunal of Arbitration at Geneva on behalf of the United States, though empty in the particular case to which it was applied, suggests that the essential elements of the definition of a base possess a wider scope than is usually given to them. In 1865 the *Shenandoah*, a Confederate cruiser, was refitted at Melbourne, and obtained a supply of coal, which seems to have enabled her to commit depredations in the neighbourhood of Cape Horn on whalers belonging to the United

PART IV.  
CHAP. III.  
—

Special mode in which cruisers may make neutral ports their base of operations.

<sup>1</sup> Jomini, *Précis de l'Art de la Guerre*, 1<sup>re</sup> partie, chap. iii. art. 18.

PART IV. States. It was urged on the part of the government of that  
CHAP. III. country that 'the main operation of the naval warfare' of the Shenandoah having been accomplished by means of the coaling 'and other refitment,' Melbourne had been converted into her base of operations. The argument was unsound because continuous use is above all things the crucial test of a base, both as a matter of fact, and as fixing a neutral with responsibility for acts in themselves innocent or ambiguous. A neutral has no right to infer evil intent from a single innocent act performed by a belligerent armed force; but if he finds that it is repeated several times, and that it has always prepared the way for warlike operations, he may fairly be expected to assume that a like consequence is intended in all cases to follow, and he ought therefore to prevent its being done within his territory. If a belligerent vessel, belonging to a nation having no colonies, carries on hostilities in the Pacific by provisioning in a neutral port, and by returning again and again to it, or to other similar ports, without ever revisiting her own, the neutral country practically becomes the seat of magazines of stores, which though not warlike are necessary to the prolongation of the hostilities waged by the vessel. She obtains as solid an advantage as Russia in a war with France would derive from being allowed to march her troops across Germany. She is enabled to reach her enemy at a spot which would otherwise be unattainable.

It is not for a moment to be denied that the actual law of nations places no restriction whatever upon the purchase of provisions by a belligerent in neutral ports; and that the limitation sometimes imposed of late years upon their supply, and upon that of coal, only indicates the direction in which usage is likely to grow<sup>1</sup>. That it will remain in its present

<sup>1</sup> During the American Civil War ships of war were only permitted to be furnished with so much coal in English ports as might be sufficient to take them to the nearest port of their own country, and were not allowed to receive a second supply in the same or any other port, without special permission,

state is improbable. When vessels were at the mercy of the winds it was not possible to measure with accuracy the supplies which might be furnished to them, and as blockades were seldom continuously effective, and the nations which carried on distant naval operations were all provided with colonies, questions could hardly spring from the use of foreign possessions as a base of operations. Under the altered conditions of warfare, it cannot be admitted that the old rule is consistent with the principles of neutrality.

PART IV.  
CHAP. III.

§ 222. In the case of an expedition being organised in and starting from neutral ground, a violation of neutrality may take place without the men of whom it is composed being armed at the moment of leaving. In 1828, a body of troops in the service of Dona Maria, who had been driven out of Portugal, took refuge in England. They remained for some time an organised body under military officers. In the beginning of 1829 they embarked in four vessels, nominally for Brazil, but in fact for Terceira, an island belonging to Portugal. In order to avoid the arrest of the expedition in England, the arms intended for it had been sent as merchandise from a port other than that from which the men started. The English government considered that as the men were soldiers, although unarmed, they constituted a true expedition, and a small squadron was placed in the neighbourhood of Terceira to prevent a landing from being effected. The vessels were stopped within Portuguese waters, and were escorted back to Europe<sup>1</sup>. The British government interfered so thoroughly at the wrong time and in the wrong

What constitutes an expedition.

until after the expiration of three months from the date of receiving such coal. Earl Russell to the Lords Commissioners of the Admiralty, Jan. 31, 1862. The regulations of the United States in 1870 were similar; no second supply being permitted for three months unless the vessel requesting it had put into a European port in the interval. State Papers, 1871, lxxi. 167. Among late writers, Ortolan (ii. 286), Bluntschli (§ 773), and Heffter (§ 149) simply register the existing rule. Calvo (§ 1083) expresses his approval of the English regulations.

<sup>1</sup> Hansard, N. S. xxiii. 738-81, and xxiv. 126-214; Bulwer's Life of Lord Palmerston, i. 301-2.

PART IV. manner, that in curing a breach of its own neutrality it was  
 CHAP. III. drawn into violating the neutrality of Portugal. But on the  
 main point, as to the character of the expedition, it was no  
 less distinctly right than in its methods it was wrong.

On the other hand, the uncombined elements of an expedition may leave a neutral state in company with one another, provided they are incapable of proximate combination into an organised whole. In 1870, during the Franco-German war, nearly 1,200 Frenchmen embarked at New York in two French ships, the *Lafayette* and the *Ville de Paris*, for the purpose of joining the armies of their nation at home. They were not officered or in any way organised; but the vessels were laden with 96,000 rifles and 11,000,000 cartridges. Mr. Fish was of opinion that the ships could not be looked upon as intended to be used for hostile purposes against Germany; the men not being in an efficient state, and the arms and ammunition being in themselves subjects of legitimate commerce<sup>1</sup>. There can be no doubt that the view taken by the government of the United States was correct. It was impossible for the men and arms to be so combined on board ship, or soon after their arrival in France, as to be capable of offensive use.

Expeditions combined outside neutral territory from elements issuing separately from it.

§ 223. It has been proposed to stretch the liability of a neutral sovereign so as to make him responsible for the ultimate effect of two independent acts done within his jurisdiction, each in itself innocent, but intended by the persons doing them to form part of a combination having for its object the fitting out of a warlike expedition at some point outside the neutral state. The argument upon which this proposal rests has been shortly stated as follows: 'The intent covers all cases, and furnishes the test. It must be immaterial where the combination is to take place, whether here or elsewhere, if the acts done in our territory—whether acts of building, fitting, arming, or of procuring materials

<sup>1</sup> Mr. Thornton to Lord Granville, Aug. 26, 1870; State Papers, 1871, lxxi. 128.

for those acts—be done as part of a plan by which a vessel is to be sent out with intent that she shall be employed to cruise<sup>1</sup>.’

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In accordance with this view, it was contended on the part of the United States before the Tribunal of Arbitration at Geneva that the *Alabama* and *Georgia*, two vessels in the Confederate service, were in effect ‘armed within British jurisdiction.’ The *Alabama* left Liverpool wholly unarmed on July 29, 1862, and received her guns and ammunition at Terceira, partly from a vessel which cleared a fortnight later from Liverpool for Nassau in the Bahamas, and partly from another vessel which started from London with a clearance for Demerara. In like manner the *Georgia* cleared from Glasgow for China, and received her armament off the French coast from a vessel which sailed from Newhaven in Sussex.

The intent of acts, innocent separately, but rendered by this theory culpable when combined, can only by their nature be proved when the persons guilty of them are no longer within neutral jurisdiction. They cannot therefore be prevented by the state which is saddled with responsibility for them; and this responsibility must mean either that the neutral state will be held answerable in its own body for injury suffered by the belligerent, in which case it will make amends for acts over which it has had no control, or else that it is bound to exact reparation from the offending belligerent, at the inevitable risk of war.

If this doctrine were a logical consequence of the accepted principles of international law it might be a question whether it would not be wise to refuse operation to it on the ground of undue oppressiveness to the neutral. But no such difficulty arises; for, as responsibility is the correlative of power, if a nation is to be responsible for innocent acts which become noxious by combination in a place outside its boundaries, it must be enabled to follow their authors to the place where

<sup>1</sup> Dana, Notes to Wheaton, Elem. No. 215.



PART IV. the character of the acts becomes evident, and to exercise the  
 CHAP. III. functions of sovereignty there. But even on the high seas it  
 is not permissible for a non-belligerent state to assume control  
 over persons other than pirates or persons on board its own  
 ships; and within foreign territory it has no power of action  
 whatever.

Limits of  
 neutral  
 responsi-  
 bility.

The true theory is that the neutral sovereign has only to do with such overt acts as are performed within his own territory, and to them he can only apply the test of their immediate quality. If these are such in themselves as to violate neutrality or to raise a violent presumption of fraud, he steps in to prevent their consequences; but if they are presumably innocent, he is not justified in interfering with them. If a vessel in other respects perfectly ready for immediate warfare is about to sail with a crew insufficient for fighting purposes, the neutral sovereign may reasonably believe that it is intended secretly to fill up the complement just outside his waters. Any such completion involves a fraudulent use of his territory, and an expectation that it is intended gives him the right of taking precautions to prevent it. But no fraudulent use takes place when a belligerent in effect says: I will not compromise your neutrality, I will make a voyage of a hundred miles in a helpless state, I will take my chance of meeting my enemy during that time, and I will organise my expedition when I am so far off that the use of your territory is no longer the condition of its being.

Equipment  
 of vessels  
 of war in  
 neutral  
 territory.

§ 224. It is somewhat difficult to determine under what obligations a neutral state lies with respect to vessels of war and vessels capable of being used for warlike purposes, equipped by or for a belligerent within its dominions.

1. Is the mere construction and fitting out, in such manner that they shall be capable of being used by him for warlike purposes, an international offence? or,

2. Is such construction to be looked upon as an act of legitimate trade; and is it necessary, to constitute an inter-

national offence, that some further act shall be done, so as to make such vessels elements in an expedition?

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The direct logical conclusions to be obtained from the ground principles of neutrality go no further than to prohibit the issue from neutral waters of a vessel provided with a belligerent commission, or belonging to a belligerent and able to inflict damage on his enemy. A commission is conclusive evidence as to the fact of hostile intent; and in order to satisfy the alternative condition it is not necessary that the ship shall be fully armed or fully manned. A vessel intended to mount four guns and to carry a crew of two hundred men would be to an unarmed vessel sufficiently formidable with a single gun and half its complement of seamen. But to possess any force at all, it must possess a modicum of armament, and it must have a crew sufficient at the same time to use that armament and to handle the ship. If then the vessel seems at the moment of leaving the neutral port to fulfil these conditions, the neutral must, judging from the facts, infer a hostile intent, and prevent the departure of the expedition.

When, on general principles of International Law, (1) a breach of neutrality is committed.

On the other hand, it is fully recognised that a vessel completely armed, and in every respect fitted the moment it receives its crew to act as a man of war, is a proper subject of commerce. There is nothing to prevent its neutral possessor from selling it, and undertaking to deliver it to the belligerent either in the neutral port or in that of the purchaser, subject to the right of the other belligerent to seize it as contraband if he meets it on the high seas or within his enemy's waters. 'There is nothing,' says Mr. Justice Story, 'in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit<sup>1</sup>.' If the neutral may sell his vessel when built, he may build it to order; and it must be permissible, as between the belligerent and the neutral state, to give the

(2) An armed vessel is merely contraband of war.

<sup>1</sup> *La Santissima Trinidad*, vii Wheaton, 340.

PART IV. order which it is permissible to execute. It would appear  
 CHAP. III. therefore, arguing from general principles alone, that a vessel of war may be built, armed, and furnished with a minimum navigating crew, and that in this state, provided it has not received a commission, it may clear from a neutral harbour on a confessed voyage to a belligerent port without any infraction of neutrality having been committed.

Effect of  
usage.

§ 225. The question remains, Is there a special usage with respect to the building and fitting out of ships which abridges the common law privileges of neutrals?

It has been already mentioned that in 1779 the neutrality edicts of various minor Italian States rendered it penal to sell, build, or arm privateers or vessels of war for any of the then belligerents; and a like provision occurs in the Austrian ordinances of 1803<sup>1</sup>.

Practice of  
the United  
States.

In 1793 the instructions issued to the collectors of customs of the United States professed, according to an accompanying memorandum, to mark out the boundaries of neutral duty as then understood by the American government. And though Washington, in a speech to Congress<sup>2</sup>, took the narrower ground that in the then posture of affairs he had resolved to 'adopt general rules which should conform to the treaties and assert the privileges of the United States,' the wider language of the memorandum should probably be preferred. The first paragraph declares 'that the original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military service, offensive or defensive, is deemed unlawful;' and the seventh adds that 'equipments of vessels in the ports of the United States which are of a nature solely adapted to war are deemed unlawful<sup>3</sup>.' These regulations, besides forbidding the original arming and equipping of vessels by a belligerent, prohibit

<sup>1</sup> Ante, p. 512; De Martens, Rec. viii. 106.

<sup>2</sup> Dec. 3, 1793.

<sup>3</sup> The word 'original' not being repeated, either the first paragraph becomes mere surplusage, or the equipment forbidden in the seventh paragraph must be read as equipment other than original.

the reception of any warlike equipment by vessels already belonging to him: but they do not specify as illegal the building and arming of a vessel intended to be delivered outside neutral territory, but not belonging to a belligerent at the moment of exit, although built to his order. The Neutrality Act of the United States went further, and made it penal to fit out and arm or procure to be fitted out and armed, &c. any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign state to cruise or commit hostilities against the subjects, &c. of another state with which the United States shall be at peace<sup>1</sup>. For some time the policy of the United States was in strict accordance with their municipal law; and subsequently they have at least expected the conduct of other nations to

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<sup>1</sup> Act of 1795, sect. 3. In this instance indications external to the Act lead to the belief that it was intended to give effect to what was believed to be the duty of a neutral state; but it must be remembered that it is generally unsafe to use municipal laws to define the view of international duty taken by a nation. It may be more convenient to discourage the inception of acts, which would only in a later stage become international wrongs, than to deal with them when ripe; and it was never pretended that a nation lies under an international obligation to give effect to its municipal regulations, until the United States suggested the doctrine for a special object to the arbitrators at Geneva. For reasons of humanity England chose to go beyond the line of duty towards persons not her own subjects in keeping up a squadron on the coast of Africa for the suppression of slavery. It would be as reasonable to say that she contracted an international obligation to continue the maintenance of this squadron, as to declare that a country is bound by a municipal law which is in advance of what can be required of it by international usage.

Relation of  
municipal  
laws to in-  
ternational  
duty.

There are only two ways—both of them indirect—in which municipal laws can produce an international effect. After a law has been administered for some time by the courts of a state, it either insensibly becomes to the majority of the people their standard of right, or it arouses in them pronounced dislike. In the latter case a law dealing with such matters as international relation will fall into desuetude or be repealed. In the former a tendency will in time grow up to act according to its provisions irrespectively of the obligations which it imposes. So long also as the law is administered at all, foreign nations will each expect to reap the full benefit which has accrued to another from its operation; and any failure on the part of the neutral government to make use of its powers gives a ground for suspecting unfriendliness, which the belligerent cannot be expected in the heat of war to estimate at its true value. It is therefore unwise for a people to enact or to retain neutrality laws more severe than it believes the measure of its duty to compel.

PART IV. be in conformity with its requirements; it must therefore  
 CHAP. III. be supposed to continue to embody what are to their view  
 — international duties.

Of Eng-  
land.

England has also retained a Foreign Enlistment Act for many years upon her Statute Book, and she has lately strengthened its provisions after full warning of the manner in which municipal laws may be employed to damnify the position of a nation in international controversy.

Finally, Great Britain and the United States have agreed that they will for the future 'use due diligence to prevent the fitting out, arming, or equipping within the jurisdiction' of the contracting power 'of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use<sup>1</sup>.' As the respective governments of the two countries are not agreed on the true meaning of this language, it is useless to speculate as to the effect which might be given to the provisions of the Treaty of Washington during any future war in which either Great Britain or the United States is a belligerent, the other of the two being neutral.

Of France. In France no special law exists forbidding the construction or outfit of vessels of war, but all persons exposing the state to reprisals or to a declaration of war are liable to punishment under the Penal Code, which leaves the state to accommodate its rules to international law existing for the time being<sup>2</sup>; and in 1861, on the outbreak of the American Civil War, a Proclamation of Neutrality was issued, referring to the appropriate articles of the Code, and prohibiting all

<sup>1</sup> Treaty of Washington, art. vi.

<sup>2</sup> Code Pénal, arts. 84 and 85. For a summary of the municipal laws of France affecting enlistments and expeditions, see letters of M. de Moustier to Mr. Fane, Neut. Laws Commissioners' Rep., Append. iv. p. 46.

French subjects from 'assisting in any way the equipment or armament of a vessel of war or privateer of either of the two parties.' Under this proclamation six vessels which were in course of construction in French ports for the Confederate States were arrested.

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In 1864 the Danish war gave occasion to Italy for the adoption of a like rule; and in 1866 the government of the Netherlands for the first time 'undertook to see that the equipment of vessels of war intended for the belligerent parties should not take place in the ports of the Netherlands<sup>1</sup>.' The codes of Austria, Spain, Portugal, and Denmark prohibit any one to procure arms, vessels, or munitions of war for the service of a foreign power<sup>2</sup>. The intention may have been to prevent the issue of privateers, but the language would no doubt restrain the construction of vessels for belligerent use. No nation except England and the United States has gone further than to prohibit the armament of a vessel fitted solely for fighting purposes.

Of other  
nations.

A comparison of international custom with the logical results of the unquestioned principles of neutrality seems then to lead to these conclusions.

Conclu-  
sions as to  
existing  
law.

1. That an international usage prohibiting the construction and outfit of vessels of war, in the strict sense of the term, is in course of growth, but that although it is adopted by the most important maritime powers, it is not yet old enough or quite wide enough to have become compulsory on those nations which have not yet signified their voluntary adherence to it.

2. That in the meantime a ship of war may be built and armed to the order of a belligerent, and delivered to him outside neutral territory ready to receive a fighting crew; or it may be delivered to him within such territory, and may

<sup>1</sup> Note of M. Zuylen de Nyevelt to Mr. Ward, 1867. For this and the whole continental practice in the matter, see Neut. Laws Commissioners' Rep., Append. iv.

<sup>2</sup> Rev. de Droit Int. vi. 502.

PART IV. issue as belligerent property, if it is neither commissioned nor  
 CHAP. III. so manned as to be able to commit immediate hostilities, and  
 if there is not good reason to believe that an intention exists  
 of making such fraudulent use of the neutral territory as has  
 been before indicated <sup>1</sup>.

<sup>1</sup> In drawing these conclusions I find myself compelled to differ from the most recent writers. According to M. Heffter : 'On comprend encore sous la dénomination de contrebande . . . l'envoi de vaisseaux de guerre construits ou armés dans un port neutre ou ailleurs, effectué pour le compte d'un belligérant.' § 161. 'Le neutre doit veiller avec soin à ce que l'un des belligérants n'arme dans ses ports aucun bâtiment de guerre, ni aucun corsaire.' § 147.

M. Bluntschli declares that 'l'État neutre est tenu d'exercer une surveillance rigoureuse et d'empêcher que des particuliers n'arment des navires de guerre sur son territoire et ne les y livrent à l'un des belligérants . . . la fourniture de navires de guerre constitue évidemment un appui et un renfort accordé aux belligérants.' § 763. 'Lorsqu'un navire de guerre est vendu à l'un des belligérants à titre d'entreprise purement commerciale ou industrielle, il y aura dans ce cas contrebande de guerre, mais cet acte ne constituera pas une violation des devoirs des neutres.' § 764.

M. Calvo says : 'Ce que nous venons de dire de la levée de troupes doit s'appliquer également à la construction ou à l'équipement dans un port neutre de vaisseaux armés en guerre par les soins ou pour le compte de l'un des belligérants. L'État neutre est moralement tenu d'exercer à ce sujet une surveillance des plus rigoureuses, et d'empêcher par tous les moyens en son pouvoir des actes éminemment hostiles.' § 1058.

M. Ortolan says : 'Si l'on suppose un navire construit sur le territoire neutre, non pas sur commande d'un belligérant ou par suite d'un traité ostensible ou dissimulé avec ce belligérant, mais en vue d'un dessein quelconque, soit de navigation commerciale, soit tout autre, et que ce navire, déjà par lui même propre à la guerre ou de nature à être converti à cet usage, une fois sorti des ports de la nation neutre, soit vendu, dans le cours de sa navigation, occasionnellement, à l'un des belligérants, et se mette à naviguer en destination directe pour ce belligérant ; un tel navire, dans de telles circonstances, tombe uniquement sous le coup des règles relatives à la contrebande de guerre. . . . Mais la situation change si l'on suppose qu'il s'agisse de bâtiments de guerre construits, armés, ou équipés sur un territoire neutre pour le compte d'un belligérant, par suite d'arrangement pris à l'avance avec lui, sous la forme d'un contrat commercial quelconque—vente-commission, louage d'industrie ou de travail ; que les arrangements aient été pris ostensiblement, ou qu'ils le soient d'une manière secrète ou déguisée ; car la loyauté est une condition essentielle dans la solution des difficultés internationales, et sous le couvert des fausses apparences il faut toujours aller au fond des choses.

'Les publicistes en crédit ne font aucun doute pour ce qui concerne l'armement et l'équipement dans un port neutre de bâtiments de guerre destinés à accroître les forces des belligérants. Ils s'accordent pour reconnaître l'illégalité



That the usage which is in course of growth extends the duties of a neutral state into new ground is plain; but it does not follow that the extension is either unhealthy or unnecessary. Though an armed ship does not differ in its nature from other articles merely contraband of war, it does differ from all in the degree in which it approaches to a

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de ces armements ou équipements, comme une infraction de la part de l'État neutre qui les tolérerait aux devoirs de la neutralité.

'N'est-il pas évident qu'il en doit être de même à *fortiori* de la construction de pareils bâtiments, lorsque cette construction a lieu dans les conditions prévues en notre seconde hypothèse?' vol. ii. 208-10.

It does not appear to me to be quite clear at what conclusions MM. Heffter and Bluntschli arrive; and I cannot but think that both they and M. Ortolan struggle, under the guidance of their wishes, to reconcile what they feel to be existing law with what I am willing to admit approximates to the probable future rule. I do not however think that it would be convenient to adopt a usage entirely corresponding to their language. It implies a principle which is more frankly expressed by Mr. Dana in a note to Wheaton's Elements, No. 215. He says: 'Our rules do not interfere with *bond fide* commercial dealings in contraband of war. An American merchant may build and fully arm a vessel, and provide her with stores, and offer her for sale in our own market. If he does any acts as an agent or servant of a belligerent, or in pursuance of an arrangement or understanding with a belligerent, that she shall be employed in hostilities when sold, he is guilty. He may, without violating our law, send out such a vessel, so equipped, under the flag and papers of his own country, with no more force of crew than is suitable for navigation, with no right to resist search or seizure, and to take the chances of capture as contraband merchandise, of blockade, and of a market in a belligerent port. In such case, the extent and character of the equipments are as immaterial as in the other class of cases. The intent is all. The act is open to great suspicions and abuse, and the line may often be scarcely traceable; yet the principle is clear enough. Is the intent one to prepare an article of contraband merchandise, to be sent to the market of a belligerent, subject to the chances of capture and of the market? Or, on the other hand, is it to fit out a vessel which shall leave our port to cruise, immediately or ultimately, against the commerce of a friendly nation? The latter we are bound to prevent; the former the belligerent must prevent.'

It is eminently inadvisable in matters which may lead to international controversy to adopt as the test of the character of an action anything so indeterminate as to be 'often scarcely traceable.' No intent other than that which is inferred from acts of a broadly marked character can be safely so used, and such intent as is required for the fine distinctions of all the above writers, with the exception of M. Calvo, would certainly be hidden under the most elaborate precautions, and would be in the highest degree difficult of proof. If taken as a test of legitimacy in trade, it would either be nugatory or unjust in its consequences to the neutral state.



PART IV. completed means of attacking an enemy. The addition of a  
 CHAP. III. few trained men to its equipage, and of as much ammunition  
 as can be carried in a small coasting vessel, adapts it for  
 immediate use as part of an organised whole of which it is the  
 most important element. The same cannot be said of any  
 other article of contraband. It is neither to be expected nor  
 wished that belligerent nations should be patient of the  
 injury which would be inflicted upon them by the supply of  
 armed vessels to their enemies as mere contraband of war.

Within  
 what limits  
 equipment  
 of vessels  
 should be  
 forbidden.

But it is much to be hoped that the rule will not retain  
 the indefiniteness which attaches to it in its present inchoate  
 form. In planting their doctrine upon the foundation of the  
 intent of the neutral trader, or of the agent of the offending  
 belligerent in the neutral country, instead of upon the  
 character of the ship itself, publicists appear hardly to have  
 realised how unimportant is the advantage which is given  
 to the injured belligerent in comparison with the grave evils  
 of an indefinite increase in the number of international  
 controversies. Experts are perfectly able to distinguish  
 vessels built primarily for warlike use; there would therefore  
 be little practical difficulty in preventing their exit from neutral  
 ports, and there is no reason for relieving a neutral govern-  
 ment from a duty which it can easily perform. But it is  
 otherwise with many vessels primarily fitted for commerce.  
 Perhaps few fast ships are altogether incapable of being so used  
 as to inflict damage upon trade; and there are at least two  
 classes of vessels which on the principles urged by the govern-  
 ment of the United States in the case of the *Georgia* might fix  
 a neutral state with international responsibility in spite of the  
 exercise by it of the utmost vigilance. Mail steamers of  
 large size are fitted by their strength and build to receive  
 without special adaptation one or two guns of sufficient  
 calibre to render the ships carrying them dangerous cruisers  
 against merchantmen; and steam yachts and vessels of the  
 type of the packets plying between Dover and Calais are well  
 suited for use as torpedo vessels. These vessels, though of

distinct character in their more marked forms, melt insensibly into other types, and it would be impossible to lay down a rule under which they could be prevented from being sold to a belligerent and transformed into constituent parts of an expedition immediately outside neutral waters without paralysing the whole ship-building and ship-selling trade of the neutral country.

§ 226. The jurisdiction of a sovereign being exclusive, upon him necessarily depends the liberty of the person and the ownership of property within his dominions. If any one is retained in captivity there, he is identified with the act; and therefore, as it has always been held, with obvious reason, that it is a continuation of hostilities to bring prisoners of war into neutral territory, its sovereign cannot allow subjects of a state with which he is in amity to remain deprived of their freedom in places under his control. If they touch his soil they cease to be prisoners<sup>1</sup>. An exception from this general rule is made in the case of prisoners on board a commissioned ship of a belligerent power, since the act of retaining them in custody falls under the head of acts beginning and ending on board the ship, and not taking effect externally to her, and is therefore one in respect of which a ship of war, under its established privileges, is independent of the jurisdiction of a foreign state within the waters of which it may be<sup>2</sup>.

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Effect of  
neutral  
sove-  
reignty  
upon,  
1. cap-  
tured  
persons,

<sup>1</sup> Vattel, liv. iii. chap. vii. § 132; Lord Stowell, in *The Twee Gebroeders*, iii Rob. 165; Bluntachli, § 785. In 1588 several hundred Turkish and Barbary captives escaped from one of the galleys of the Spanish Armada which was wrecked near Calais. They were claimed by the ambassador of Spain, but the council of the king decided that in touching the shores of France they had regained their liberty, and they were sent to Constantinople. Martin, *Hist. de France*, x. 93. The Neutrality Ordinance of Austria of 1803 says: 'Il ne sera pas permis aux Puissances belligérantes de mettre à terre dans nos ports, etc., aucun individu comme prisonnier de guerre: car aussitôt que de tels prisonniers auraient mis le pied sur le territoire d'un souverain neutre ou ami de leur gouvernement ils devront être regardés comme libres, et toutes les autorités civiles et militaires leur devront, sous ce rapport, protection et assistance.' De Marten, *Rec.* viii. 111; and the Neutrality Edict of Venice, 1779, art. xx, ib. iii. 84.

<sup>2</sup> See § 53. The principle is applicable to privateers, *L'Invincible*, i Wheaton, 252; and according to Hautefeuille (tit. vi. chap. ii. sect. 3) and Calvo (§ 265) it so far extends to prizes that prisoners may be retained on board of them.

**PART IV.** It is not easy to see why property should not be subject to  
**CHAP. III.** the principle which governs the treatment of persons. It is  
**2. property.** in fact admitted in the case of that which has come into the  
 possession of a belligerent by way of booty, if the require-  
 ments of deposit in a safe place or possession during twenty-  
 four hours have not been satisfied before neutral territory is  
 entered<sup>1</sup>. But the practice with respect to property taken at  
 sea has till lately been anomalous. The right of the captor  
 to that which unquestionably belongs to his enemy is no  
 doubt complete as between him and his enemy so soon as  
 seizure has been effected; but as between him and a neutral  
 state, as has been already seen<sup>2</sup>, further evidence of definitive  
 appropriation is required, and his right to the property of  
 a neutral trader seized, for example, as being contraband  
 goods or for breach of blockade, is only complete after judg-  
 ment is given by a prize court. If therefore the belligerent  
 carries his prize into neutral waters, without deposit in a safe  
 place or possession during twenty-four hours in the case of  
 hostile property, or without protection from the judgment of  
 a prize court in the case of neutral property, he brings there  
 property which does not yet belong to him; in other words,  
 he continues the act of war through which it has come into  
 his power. Indirectly also he is militarily strengthened by  
 his use of the neutral territory; he deposits an encumbrance,  
 and by recovering the prize crew becomes free to act with  
 his whole force. Nevertheless, although the neutral may  
 permit or forbid the entry of prizes as he thinks best, the  
 belligerent is held, until express prohibition, to have the  
 privilege not only of placing his prizes within the security  
 of a neutral harbour, but of keeping them there while the  
 suit for their condemnation is being prosecuted in the appro-  
 priate court<sup>3</sup>. Most writers think that he is also justified

<sup>1</sup> Vattel, liv. iii. ch. vii. § 132.

<sup>2</sup> § 149.

<sup>3</sup> 'An attentive review of all the cases decided in the courts of England and the North American United States during the last war (1793-1815) leads to the conclusion that the condemnation of a capture by a regular prize court, sitting in the country of the belligerent, of a prize lying at the time of the

by usage in selling them at the neutral port after condemnation ; and, as they then undoubtedly belong to him, it is hard to see on what ground he can be prohibited from dealing with his own<sup>1</sup>. But it is now usual for the neutral state to restrain belligerents from bringing their prizes into its harbours, except in cases of danger or of want of provisions, and then for as short a time as the circumstances of the case will allow ; and it is impossible not to feel an ardent wish that a practice at once wholesome and consistent with principle may speedily be transformed into a duty<sup>2</sup>.

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§ 227. It follows from the fact of a violation of the sovereignty of a nation being an international wrong, that the injured country has the right of demanding redress ; and the obligation under which a neutral state lies to prevent infraction of its neutrality would seem to bring with it the duty of enforcing such redress in all cases in which the state would act if its own dignity and interests were alone affected. Its duty cannot be less than this, because quiescence under any act, which apart from the interests of the belligerent would not be permitted, is the concession of a special favour to his enemy ; and it cannot be more, because no one has a right to expect another to incur greater inconvenience or peril for

Duty of  
a neutral  
state to  
procure re-  
dress for  
injuries  
done to a  
belligerent  
within its  
territory.

sentence in a neutral port, is irregular, but clearly valid.' This is also the law in France. Phillimore, iii. § cclxxix.

<sup>1</sup> Ortolan, *Dip. de la Mer*, ii. 303, 306, 310. He grounds the admission of prizes into a neutral port on the *prima facie* evidence of property which is afforded by the belligerent flag.

Kent, *Comm.* lect. vi ; Manning, 387 ; Wheaton, *Elem.* pt. iv. ch. iii. § 13 ; Heffter, § 147.

Bluntschli (§ 777 and 857) appears to agree with the above writers as to the existing law, but to think, as is unquestionably the fact, that it is in course of being changed.

Phillimore (iii. § cxxxix) seems to look upon a treaty made before outbreak of war as needed to make the reception of prizes a strictly legitimate act.

<sup>2</sup> Denmark laid down the rule for her guidance so long ago as 1823, and England, France, the United States, Prussia, Italy, Sweden, Holland, Spain, Portugal, and the Hanseatic Towns have gradually acceded to it. Some admit prizes taken by public ships of war, while excluding those captured by privateers ; but all forbid their sale. *Neut. Laws Commissioners' Report*, Appenl. iv ; Calvo, § 1090.

PART IV. him in their common quarrel than a man actuated by the ordinary motives would undergo on his own account. A state is

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Practice in the matter.

supposed not to allow open violations of its territory to take place without exacting reparation ; it is therefore expected to demand such reparation in the interest of the belligerent who may have received injury at the hands of his enemy within the neutral jurisdiction. And as from the exclusive force of the will of a sovereign state, all acts contrary to it done within the territory of the state are void, the redress which it is usual to enforce consists in a replacement in its anterior condition, so far as may be possible, of anything affected by the wrongful act. Thus, when in 1864 the Confederate cruiser *Florida* was seized in the harbour of Bahia by the United States steamer *Wachusett*, the Brazilian Government immediately demanded reparation from the Cabinet at Washington. The latter was unable to restore the vessel, which had foundered in Hampton Roads, but it surrendered the crew, and offered a more special satisfaction for the affront to Brazilian sovereignty by saluting the flag of the Empire at the spot where the offence had been committed, by dismissing the consul at Bahia, and by sending the captain of the *Wachusett* before a court-martial. Again, in 1863, the *Chesapeake*, a passenger boat plying between New York and Portland, was captured on its voyage by a small number of Confederate partisans, who had embarked at New York. She was pursued by an armed vessel belonging to the United States, which found her and seized her in British waters. Two men only were on board, the rest of the captors having deserted her, but a third prisoner was taken out of an English ship lying alongside. The United States surrendered the vessel and the men, and made an apology for the violation of territory of which its officers had been guilty<sup>1</sup>.

When property captured in violation of neutrality returns to

If an occasion offers, the neutral sovereign will take upon himself to undo the wrongful act of the belligerent. When property is captured in violation of neutrality, whether actually within the neutral territory, or by a vessel fitted out

<sup>1</sup> Dana's *Wheaton*, note Nos. 207 and 209, gives the cases in detail.

in a neutral port, it will be seized on entering the neutral jurisdiction, and will be restored to its original owner<sup>1</sup>; and as a state possesses a right of pursuing vessels into the open

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the neutral  
jurisdiction.

<sup>1</sup> Wheaton, Elem. pt. iv. chap. iii. § 12; Pando, tit. iii. sect. vii. § 192; Hautefeuille, tit. vi. sect. ii. and tit. xiii. sect. 1. § 2; Ortolan, Dip. de la Mer, ii. 298; Phillimore, iii. § clvii-viii, § cccxxvii, and § cclxxii. Calvo (§ 1248) limits the right of the neutral sovereign to cases of capture within his jurisdiction.

'When a captured vessel is brought, or voluntarily comes *infra præsidia* of the neutral power, that power has the right to inquire whether its own neutrality has been violated by the capture, and if so it is bound to restore the property.' La Estrella, iv Wheaton, 298. See also La Amistad de Rues, v Wheaton, 385; Talbot v. Janson, iii Dallas, 157; and the Betsey Cathcart, Bee. 292. Mode in which restitution is effected.

Properly, whatever the municipal means employed, restoration ought in all cases to be effected, so far as the surrender to the belligerent is concerned, by an immediate act of the state. The wrong being solely international, all its consequences are international also; and in most countries restoration may be made either by the state administratively, or by its courts judicially. Calvo, § 1080; Hautefeuille, ubi sup. But the advantage, when the property of individuals is involved, of a judicial investigation of evidence, generally throws such cases into the lap of the courts. When restoration is craved on the ground of capture within the neutral territory, the belligerent government is expected itself to prosecute the suit—the individual owner will not be heard; and even a consul is not clothed with sufficient representative character to appear on behalf of his state. Note to the Twee Gebroeders, iii Rob. 162; La Santissima Trinidad, vii Wheaton, 341; The Anne, iii Wheaton, 446. The latter part of the rule is undoubtedly logical. 'Capture in neutral waters as between enemies is deemed to all intents and purposes rightful. If the neutral sovereign omits or declines to put in a claim, the property is condemned *jure belli* to the captors.' The Anne, iii Wheaton, 447; and see Bluntschli, § 786. But when the capture has been the result of a remoter breach of neutrality on the part of the offending belligerent, as by making neutral territory a base of operations, the private owner is allowed to claim in the courts of the United States. Justice Story, speaking in 1822, said: 'If the question were entirely new it would deserve very grave consideration whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than by a direct interposition of the government itself. But the practice from the beginning of this class of cases, a period of nearly thirty years, has been uniformly the other way, and it is now too late to disturb it.' La Santissima Trinidad, vii Wheaton, 349. If the captured property has been carried into the jurisdiction of the belligerent whose subjects are the wrongdoers, his courts will do justice to the neutral state on application being made by it to them. Twee Gebroeders, ubi sup.; La Nostra Señora del Carmel contre la Vénus de Medicis; Pistoye et Duverdy, Traité des Prises Maritimes, i. 106; Ortolan, ii. 298.

The practice is everywhere more or less erroneous theoretically. There can be no doubt that it is the government within whose territory the wrong has been done which ought to call into action its own courts in all instances in

PART IV. sea and arresting them there for infractions of its municipal  
 CHAP. III. laws, directed only against itself, it must be held competent  
 — to give effect by like action to its neutral duties<sup>1</sup>.

When it  
 so returns  
 after hav-  
 ing been  
*infra præ-*  
*sidia* of  
 the captor.

According to Wheaton it is doubtful whether the neutral will restore property 'which has been once carried *infra præsidia* of the captor's country, and there regularly condemned in a competent court of prize;' but Ortolan justly urges that as the sovereign rights of a nation cannot be touched by the decision of a foreign tribunal, the consequences of such a decision cannot be binding upon it<sup>2</sup>; and it may be put still more generally that nothing performed *mero motu* by a wrong-doer in confirmation of his own wrongful act can affect the rights of others.

When it is  
 a vessel  
 which has  
 been con-  
 verted into  
 a commis-  
 sioned ship  
 of war.

The case however stands differently when the captured property is a ship which, before returning to the neutral port, has been furnished with a commission from the captor's sovereign. The Admiralty courts of the neutral may enquire whether the vessel is in fact commissioned<sup>3</sup>; but so soon as it is proved to be invested with a public character, though the right of the neutral state to expect redress for the violation of its sovereignty remains unaltered, its own right to apply the remedy is gone. The vessel has become invested with the immunities belonging to public ships of a state. Its seizure would therefore be an act of war, and the neutral

which the prize comes within its jurisdiction; and that the neutral state, when the property has been carried into the dominions of the belligerent, should confine itself to international means for obtaining restitution.

<sup>1</sup> Comp. § 80. The Courts of the United States have decided to the above effect; *Hudson v. Guestier*, vi Cranch, 284, overruling *Rose v. Himely*, iv Cranch, 279. These cases only involved breaches of municipal regulations; but they are generally held to admit of a wider application.

<sup>2</sup> Wheaton, Elem. pt. iv. chap. iii. § 13; Ortolan, Dip. de la Mer, ii. 312. An incidental remark of Justice Johnson, made while giving a decision in the Supreme Court of the United States, supports, and perhaps was the source of, Wheaton's opinion. The *Arrogante Barcelones*, vii Wheaton, 519. It has also been said that 'The sentence of a court of admiralty or of appeal in questions of prize binds all the world as to everything contained in it, because all the world are parties to it.' *Penhallow v. Doane's Executors*, iii Dallas, 86.

<sup>3</sup> *L'Invincible*, i Wheaton, 254.



can only apply for satisfaction to the offending belligerent<sup>1</sup>. PART IV.  
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But though, if a vessel so commissioned is admitted at all within the ports of the neutral, it must be accorded the full privileges attached to its public character, there is no international usage which dictates that ships of war shall be allowed to enter foreign ports, except in cases of imminent danger or urgent need. It is fully recognised that a state may either refuse such admission altogether, or may limit the enjoyment of the privilege by whatever regulations it may choose to lay down<sup>2</sup>. It is therefore eminently to be wished that a practice may be established under which a neutral government shall notify at the commencement of a war, that all vessels mixed up in certain specified ways, whether as agents or as objects, with an infringement of its neutrality, will be excluded from its ports. The rules established by the Empire of Brazil during the American Civil War adopted this precaution, though in dangerously vague language, by directing that no belligerent who had once violated the

Exclusion  
of such  
ships from  
neutral  
ports.

<sup>1</sup> It was contended on behalf of the United States before the Tribunal of Arbitration of Geneva, that Great Britain had a right to seize vessels fitted out in violation of her neutrality on entry into her ports after receipt of a commission. State Papers, North America, 1872, Case of the United States, p. 55, Argument of the United States, p. 113. The argument seems to rest on the assumptions, 1. That the privileges accorded to foreign public vessels are revocable at will; 2. That a belligerent people not recognised as a nation does not possess the same belligerent privileges as a recognised state. Neither assumption can be admitted for a moment to be correct. It is unfortunate that the arbitrators, with the exception of Sir A. Cockburn, committed themselves to the statement that 'the privilege of extritoriality accorded to vessels of war has been admitted into the Law of Nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality.' Whatever sources the immunities of vessels of war may have originally sprung from,—and, as has been seen (§ 48), courtesy was no doubt one, though not the only one,—there is no question that those immunities cannot now be refused at will.

<sup>2</sup> 'Siendo el asilo un derecho y no un deber para la Potencia neutra, claro está que puede negarlo ó concederlo, y en este último caso imponer á los buques admitidos todas las restricciones que estime convenientes á su seguridad ó á sus intereses.' Negrin, p. 179.



**PART IV.** neutrality of the Empire should be admitted to its ports  
**CHAP. III.** during the continuance of hostilities, and that all vessels attempting acts tending to such violation should be compelled to leave its maritime territory immediately, without receiving any supplies<sup>1</sup>.

No practice as yet exists with respect to the exaction by the neutral sovereign of reparation for acts done outside his jurisdiction, but flowing from a violation of his neutrality, when neither the captured property nor the peccant vessel return to his territory.

Effect of  
resistance  
by a belli-  
gerent at-  
tacked  
within  
neutral  
territory.

§ 228. A belligerent who, when attacked in neutral territory, elects to defend himself, instead of trusting for protection or redress to his host, by his own violation of sovereignty frees the neutral from responsibility.

In 1814 an American privateer, the General Armstrong, was found at anchor in Fayal harbour by an English squadron. A boat detachment from the latter approached the privateer and was fired upon. The next day one of the vessels of the squadron took up position near the General Armstrong to attack her. The crew, not finding themselves able to resist, abandoned and destroyed her. The United States alleged that the Portuguese governor had failed in his duty as a neutral, and demanded a large compensation for the owners of the privateer. After much correspondence the affair was submitted in 1851 to the arbitration of the President of the French Republic, who held that as Captain Reid, of the privateer, 'had not applied at the beginning to the neutral, but had used force to repel an improper aggression, of which he stated himself to be the object, he had himself disregarded the neutrality of the territory in which he was, and had consequently released its sovereign from all obligations to protect him otherwise than by his good offices; that from that moment the Portuguese government could not be responsible

<sup>1</sup> State Papers, North America, 1873; Protocols, &c. 202. Mr. Bernard, however, shows that such a practice would not be unattended with inconvenience. Neutrality of Great Britain, 414.

for the results of a collision which had taken place in con-  
tempt of its sovereign rights <sup>1</sup>.' PART IV.  
CHAP. III.

§ 229. A neutral state which overlooks such violations of its neutrality as it can rightly be expected to prevent, or which neglects to demand reparation in the appropriate cases, becomes itself an active offender. It is bound therefore to offer satisfaction in some form to the belligerent whose interests have been prejudiced by its laches. The nature of this satisfaction is a matter for agreement between the parties. It may consist either in an apology, in monetary compensation for actual losses, or in a combination of the two; and M. Bluntschli is certainly premature in laying down as a rule of law apart from special agreement that it is incumbent on the neutral state 'to indemnify the injured belligerent from the losses which he would have avoided had the duties of the neutral been properly fulfilled <sup>2</sup>.'

§ 230. Although it is incumbent on the neutral not to lend his territory for purposes of war, his right to admit his friends within it extends to the reception of belligerent forces under such conditions as shall guard against any abuse of his hospitality. Custom and the inherent difference between land and marine war have rendered these conditions unlike in the two cases. Perhaps the only occasion which hostilities on land afford to the neutral of extending his hospitality to belligerent persons other than those who resort to his country for commercial or private reasons, and who have therefore no relation to the war, is when a beaten army or individual fugitives take refuge in his territory from the pursuit of their enemy. Humanity and friendship alike recommend him to receive them, but his duty to the other belligerent requires that they shall not again start from his soil in order to resume hostilities; and it has been the invariable practice in late wars to disarm

Reparation  
due by a  
neutral  
state for  
permitted  
violation  
of neutral-  
ity.

Hospi-  
tality and  
asylum.

To land  
forces of a  
belligerent.

<sup>1</sup> Ortolan (*Dip. de la Mer*, ii. 547) gives the text of the President's award. Mr. Justice Story (*The Anne*, iii Wheaton, 447) seems to have considered a belligerent attacked in neutral territory to be justified in using force in self-defence.

<sup>2</sup> *Droit International*, § 779 bis.

PART IV. troops crossing the neutral frontier and to intern them till the  
 CHAP. III.

conclusion of peace. The convention under which Switzerland received the army of General Clinchant suggests a difficulty which may in the future interfere with the continuance of neutral custom in the precise form which it wears at present. It would be intolerably burdensome to a neutral state to maintain as guests for a long time any considerable body of men; on the other hand, by levying the cost of their support upon the belligerent an indirect aid is given to his enemy, who is relieved from the expense of keeping them and the trouble of guarding them as prisoners of war, while he is as safe from the danger of their reappearance in the field as if they were in his own fortresses. Perhaps the equity of the case and the necessity of precaution might both be satisfied by the release of such fugitives under a convention between the neutral and belligerent states by which the latter should undertake not to employ them during the continuance of the war.

To naval  
 forces.

§ 231. Marine warfare so far differs from hostilities on land that the forces of a belligerent may enter neutral territory without being under stress from their enemy. Partly as a consequence of the habit of freely admitting foreign public ships of war belonging to friendly powers to the ports of a state as a matter of courtesy, partly because of the inevitable conditions of navigation, it is not the custom to apply the same rigour of precaution to naval as to military forces. A vessel of war may enter and stay in a neutral harbour without special reasons; she is not disarmed on taking refuge after defeat; she may obtain such repair as will enable her to continue her voyage in safety, she may take in such provisions as she needs, and if a steamer she may fill up with coal; nor is there anything to prevent her from enjoying the security of neutral waters for so long as may seem good to her. But in the treatment of ships, as in all other matters in which the neutral holds his delicate scale between two belligerents, a tendency towards the enforcement of a harsher rule becomes more defined with each

successive war. It is easy to fix the proper measure of repairs; difficulties, which have already been discussed, may sometimes occur with reference to supplies of coal or provisions; but if a belligerent can leave a port at his will, the neutral territory may become at any moment a mere trap for an enemy of inferior strength. Accordingly, during a considerable period, though not very generally or continuously, neutral states have taken more or less precaution against the danger of their waters being so used<sup>1</sup>. Perhaps the usual custom until lately may be stated as having been that the commander of a vessel of war was required to give his word not to commit hostilities against any vessel issuing from a neutral port shortly before him, and that a privateer as being less a responsible person was subjected to detention for twenty-four hours<sup>2</sup>. The disfavour however with which privateers have long been regarded has not infrequently led to their entire exclusion, save in cases of danger from the sea or of absolute necessity; and the twenty-four hours' rule has been extended to public ships of war by Italy, France, England, the United States, and Holland. Probably it may now be looked upon as a regulation which is practically sure to be enforced in every war.

Mr. Bernard says: 'The rule that when hostile ships meet in a neutral harbour the local authority may prevent one from sailing simultaneously with or immediately after the

<sup>1</sup> So long ago as 1759 Spain laid down the rule that the first of two vessels of war belonging to different belligerents to leave one of her ports should only be followed by the other after an interval of twenty-four hours. Ortolan, *Dip. de la Mer*, ii. 257. In 1778 the Grand Duke of Tuscany forbade both ships of war and privateers to go out for twenty-four hours after a ship whether enemy or neutral (*di qualsivoglia bandiera*). De Martens, *Rec.* iii. 25. The Genoese rule was the same; Venice was contented with the promises of the neutral commander that he would not molest an enemy or neutral for twenty-four hours, but she retained privateers for that time in port. *Ib.* 80. The Austrian proclamation of neutrality of 1803 ordered vessels not to hover outside the Austrian ports, nor to follow their enemies out of them; it also imposed the twenty-four hours' rule on privateers, and in the case of ships of war required the word of the captain that he would not commit hostilities.

<sup>2</sup> Pistoye et Duverdy, i. 108.

PART IV. other, will not be found in all books on International Law.

CHAP. III. — It is however a convenient and reasonable rule; it has gained, I think, sufficient foundation in usage; and the interval of twenty-four hours adopted during the last century in a few treaties and in some marine ordinances has been commonly accepted as a reasonable and convenient interval<sup>1</sup>.

It will probably be found necessary to supplement the twenty-four hours' rule by imposing some limit to the time during which belligerent vessels may remain in a neutral port when not actually receiving repairs. The insufficiency of the twenty-four hours' rule, taken by itself, is illustrated by an incident which occurred during the American Civil War. In the end of 1861, the United States corvette *Tuscarora* arrived in Southampton Waters with the object, as it ultimately appeared, of preventing the exit of the Confederate cruiser *Nashville*, which was then in dock. By keeping up steam and having slips on her cable, so that the moment the *Nashville* moved, the *Tuscarora* should precede her, and claim priority of sailing, by moving and returning again within twenty-four hours, and by notifying and then postponing her own departure, the latter vessel attempted and for some time was able to blockade the *Nashville* within British waters. In order to guard against the repetition of such acts, it was ordered in the following January that during the continuance of hostilities, any vessel of war of either belligerent entering

<sup>1</sup> Hist. Acc. of the Neut. of Great Britain, p. 273. The treaties in which the exercise of this rule is provided for are all with the Barbary States. Bluntchli declares in unqualified terms that 'in strict law a ship of war cannot quit a neutral port for four-and-twenty hours after the departure of an enemy's vessel.' § 776 bis. If international law contained any such rule, a correlative duty of enforcing it would weigh upon the neutral; but of this I can find no indication. The neutral may take what precautions he chooses in order to hinder a fraudulent use being made of his ports provided he attains his object. If he prefers to rely upon the word of a commander, there is nothing to prevent him. Even if the twenty-four hours' rule becomes hardened by far longer practice than now sanctions it, the right of the neutral to vary his own port regulations can never be ousted. The rule can never be more than one to the enforcement of which a belligerent may trust in the absence of notice to the contrary.

an English port should 'be required to depart and to put to sea within twenty-four hours after her entrance into such port, except in case of stress of weather, or of her requiring provisions, or things necessary for the subsistence of her crew, or repairs;' in either of which cases the authorities of the port were ordered 'to require her to put to sea as soon as possible after the expiration of such period of twenty-four hours.' In 1870 the same rule was laid down; and the United States, unwilling to allow to others the license which she permitted to herself, adopted an identical regulation. It is perhaps not unlikely soon to become general <sup>1</sup>.

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CHAP. III.

<sup>1</sup> Bernard, 270; Neut. Laws Commissioners' Rep., Append. No. vi; State Papers, lxxi. 167, 1871.

Negrin (p. 180) well sums up as follows the conditions upon which belligerent vessels are now admitted into neutral ports.

'Las condiciones,' he says, 'del asilo respecto de los beligerantes son :

'1ª. Observar la mejor armonía y una paz completa en el puerto, aún con los mismos enemigos.

'2ª. No reclutar gente para aumentar ó completar las tripulaciones.

'3ª. No aumentar el calibre de la artillería, ni embarcar armas y municiones de guerra en buques militares y corsarios.

'4ª. No hacer uso del asilo para vigilar los buques enemigos ni obtener noticias sobre sus futuros movimientos.

'5ª. No abandonar el puerto hasta veintecuatro horas despues de haberlo hecho la escuadra ó buque enemigo, mercante ó de guerra que en él se hallaba.

'6ª. No intentar apoderarse, ya sea por la fuerza ó por la astucia, de las presas que pueda haber en el puerto.

'7ª. No proceder á la venta de las que se conduzcan al mismo, miéntras no hayan sido declaradas legítimas por el tribunal competente.'

## CHAPTER IV.

### GENERAL VIEW OF THE RELATIONS OF BELLIGERENT STATES AND NEUTRAL INDIVIDUALS.

PART IV. § 232. THE general right possessed by a belligerent of  
CHAP. IV. restraining commercial acts done by private persons which  
General materially obstruct the conduct of hostilities, gives rise to  
principles several distinct groups of usage corresponding to different  
of the law. commercial relations between neutrals and the other belligerents.

All trade divides itself into two great heads. It consists either in the purchase or sale of goods, or in carrying them for hire from one place to another. The purchase of goods by a neutral is the subject of no belligerent restriction. The general principle that a neutral has a right to trade with his belligerent friend, necessarily covers a commerce by which the war can in no case be directly affected. The belligerent gains nothing else than his mercantile profit, and to forbid such trade would therefore be to forbid all trade. But by the sale of goods the neutral may provide his customer with articles which, either by their own nature, or from some peculiar need on the part of the belligerent, may be of special use in the conduct of hostilities. These therefore the enemy of the latter may intercept on their road after leaving neutral soil, and before sale to a belligerent purchaser has transformed them into goods liable to seizure as enemy property. Again, under the second head

a neutral may send articles innocent in themselves for sale in places access to which the belligerent thinks it necessary for the successful issue of his war to forbid altogether, and which he is allowed to bar by so placing an armed force as to make approach dangerous; or the neutral may employ his ships in effecting a transport illicit because of the character of the merchandise or of the place to which it is taken; or finally he may associate his property with that of the belligerent in such manner as to show the existence of a community of interest, or an intention of using his neutral character to protect his friend. The effect of the various acts which fall under these heads differs with the degree of noxiousness which is attributed to them; but in all cases, as the possession of a right carries with it the further right to use the means necessary for its enforcement, the belligerent is allowed to inflict penalties of sufficient severity to be deterrent.

The larger bodies of practice which have asserted themselves successfully with reference to these divisions, may on the whole be explained by the more or less reasonable application of the principle that a belligerent has the right to carry on his operations without obstruction. It is easy to see the relation to this principle of the prohibition to carry goods the supply of which may increase the strength of a belligerent, and of that to carry any goods to besieged places; and though the connection is less plain, it can still be discovered in the cases where, by associating himself with belligerent property, a neutral would, if left alone, impede the belligerent right of weakening and embarrassing his enemy by seizing his property. But two exceptional practices must either be looked upon as abnormal, or must be explained by the admission of a different and very dangerous principle as a ground of international rule.

§ 233. The better established of these customs arises out of the right of barring access of innocent trade to an enemy's country, and under the name of commercial blockade has extended the prohibition beyond the area of purely military

PART IV.  
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Exceptional  
practices.

Commer-  
cial block-  
ade.



PART IV. operations to all coasts which can be guarded by the fleet  
 CHAP. IV. of the belligerent. A blockade which is or which forms  
 — part of a military operation, may consist in a siege,—i.e. in  
 an investment combined with an attack ; or in a simple invest-  
 ment, of which the object is to reduce a place by famine ; or in  
 the denial to commerce of territory access to which is com-  
 manded by an army, or finally in the denial to commerce of  
 a portion of coast of indefinite extent, in order to embarrass  
 the movements of a land force of the enemy which but for  
 the blockade would draw its supplies, or a portion of them,  
 from the sea. All these kinds of blockade are of course fully  
 warranted by the right of a belligerent to carry out his opera-  
 tions of war without being obstructed by neutrals. But ac-  
 cording to existing usage it would be legitimate, in a war  
 between England and the United States, for the former power  
 to blockade the whole Californian coast, while the only mili-  
 tary operations were being conducted on the Atlantic seaboard  
 and along the frontiers of Canada. To forbid all neutral com-  
 merce, when no immediate military end is to be served, and  
 when the effect of the measure upon the ultimate issue of  
 the war is so slight as usually to be almost inappreciable, is  
 to contradict in the plainest manner the elementary principle  
 that neutrals have a right, as a general rule, to trade with  
 the enemy<sup>1</sup>. If this principle can be invaded in order that a

<sup>1</sup> 'The right of blockade is founded not on any general unlimited right to cripple the enemy's commerce with neutrals by all means effectual for that purpose, for it is admitted on all hands that a neutral has a right to carry on with each of the belligerents during war all the trade which was open to him in times of peace, subject to the exceptions of trade in contraband goods and trade with blockaded ports. Both these exceptions seem founded on the same reason, viz. that a neutral has no right to interfere with the military operations of a belligerent either by supplying his enemy with materials of war, or by holding intercourse with a place which he has besieged or blockaded.' *The Franciska*, x Moore, 50.

Until the outbreak of the civil war in America some disposition was shown by the statesmen of the United States to question the propriety of commercial blockades, and they put the objection to them with much force. Mr. Marshall said : 'On principle it might well be questioned whether this rule (viz. that of confiscation of vessels) can be applied to a place not completely invested by land as well as by sea. If we examine the reasoning on which is founded the

belligerent may be subjected to a mere incidental annoyance, it is for all practical purposes non-existent. The theoretic reasoning which would justify a commercial blockade would equally justify an order, unsupported by the presence of an armed force, prohibiting neutrals from entering an enemy's port, and declaring any vessel with such destination to be a good prize. The best excuse for the usage is that the line of separation between a military and a commercial blockade is in some cases extremely fine; and that occasionally a blockade which in its origin is of the latter character is insensibly transformed into the former. Thus the blockade of the whole coasts of the Confederate States during the American Civil War, which began by being no more than the largest commercial blockade ever instituted, was ultimately of considerable military importance, and aided directly in carrying out a plan of operations which had for its object to stifle the enemy by compression on every side.

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right to intercept and confiscate supplies designed for a blockaded town, it will be difficult to resist the conviction that its extension to towns invested by sea only is an unjustifiable encroachment on the rights of neutrals.' Mr. Marshall to Mr. King, September 20, 1800; iii Wheaton, Append.

And Mr. Cass, on the breaking out of the Italian war, issued a circular to the American representatives in Europe in which it was laid down that 'The blockade of an enemy's coast, in order to prevent all intercourse with neutrals, even for the most peaceful purpose, is a claim which gains no additional strength by an investigation into the foundation on which it rests, and the evils which have accompanied its exercise call for an efficient remedy. The investment of a place by sea and land with a view to its reduction, preventing it from receiving supplies of men and materials necessary for its defence, is a legitimate mode of prosecuting hostilities, which cannot be objected to so long as war is recognised as an arbiter of national disputes. But the blockade of a coast, or of commercial positions along it, without any regard to ulterior military operations, and with the real design of carrying on a war against trade, and from its very nature against the trade of peaceful and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or the opinions of modern times. To watch every creek and river and harbour upon an ocean frontier in order to seize and confiscate every vessel with its cargo attempting to enter or go out, without any direct effect upon the true objects of war, is a mode of conducting hostilities which would find few advocates, if now first presented for consideration.' Quoted in Cobden's Speeches, vol. ii. 288. Mr. Cobden himself argued warmly in favour of the suppression of commercial blockades. See his Speeches, Foreign Policy, No. vii.

PART IV. It may also be urged that in proportion as general maritime  
 CHAP. IV. commerce becomes freed from liability to capture, it is necessary that a belligerent should be confirmed in the special privileges which enable him to overcome the advantages derived by his enemy from the ease and cheapness of transport by sea. Owing to the limitation of transport by land to certain lines of road, and to the cost of effecting it by indirect routes, an invasion intercepts trade over a larger area than could be generally touched by such maritime blockades as are combined with military operations. Hence wars which are carried on by land, incidentally establish blockades upon a very large scale, and among the means by which an invasion is calculated and intended to reduce an enemy, is the derangement to his foreign and internal trade which is caused by the occupation of his country. Although therefore, when this derangement is itself the sole object to which naval or military forces are directed, they are engaged in naval or military operations in so strained a sense that the manner in which a neutral is affected must be looked upon as anomalous, it is not likely that the right of maintaining commercial blockades will be readily abandoned, nor, in spite of the very serious objections which exist against them in their more extreme forms, is it quite certain that neutrals have a moral right to demand their cessation<sup>1</sup>.

The rule  
of the war  
of 1756.

§ 234. The second exceptional practice is that known as the rule of the war of 1756. It was formerly the policy with

<sup>1</sup> Some foreign writers (Ortolan, ii. 329; Hautefeuille, tit. ix. chap. i. sect. 1) have endeavoured to found the right of blockade on the theory that the space of water attached territorially to the land is conquered by the belligerent who occupies it with his naval forces, and that he refuses entrance to it in virtue of his territorial right. M. Cauchy objects to this, that as water is merely attached to the land, which alone renders it susceptible of appropriation, conquest of the land must be a necessary preliminary of legal right over the neighbouring sea. Whether the theory is tenable or not it is scarcely worth while to consider, for the usage did not arise out of it; it is merely a modern invention, useless for any purpose except to give a logical satisfaction to the minds of writers who without it would have been painfully affected by the abnormal character of a practice which they were bound to recognise.

all European governments to exclude foreign ships from trade with their colonies, and though this rule has been destroyed or modified, it is still unusual to permit strangers to engage in the coasting trade from one port to another of the home country.

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These exclusions gave rise to the question whether if a belligerent throws open his close trade in time of war either to a favoured neutral or to all neutrals, his enemy has a right to deny to them the enjoyment of the proffered advantages. The first occasion on which the principle came into dispute, on considerations of general law<sup>1</sup>, was in 1756, when the French, under the pressure of the maritime superiority of England, opened the trade between the mother-country and its colonies to the Dutch, while persisting in their habitual exclusion of other neutrals. The English captured and condemned the Dutch ships, with their cargoes, on the ground that they had been in effect incorporated into the French commercial navy. Before the outbreak of war in 1779, France announced, probably as a measure of precaution, that trade with her West Indian colonies would thenceforth be permanently open; the rule which the English had laid down in 1756 was therefore allowed to sleep. It is not easy to say how far acquiescence in a change of policy on the part of France, which can only have been looked upon as colourable, was suggested by the dominant opinion of the time. In the century which preceded the commencement of the American war, eight treaties, including those of Utrecht between England and France, and between France and the United Provinces, stipulated that either of the contracting parties should be at liberty to trade between ports belonging to enemies of the other<sup>2</sup>; and, as might be expected, the First

<sup>1</sup> A controversy which occurred between the English and Dutch in 1674 seems to have been determined on conventional grounds.

<sup>2</sup> These treaties were, besides those of Utrecht, that between England and the United Provinces in 1675 (Dumont, vii. i. 319), and those between the United Provinces and Spain, 1676 (ib. 325), the United Provinces and Sweden, 1679 (ib. 439), the United Provinces and Russia, 1715 (id. viii. i. 469), Spain

PART IV. Armed Neutrality asserted the freedom of coasting trade as  
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one of the privileges for which its members contended. On the other hand only two treaties have expressly declared such trade to be unlawful; but the French Règlements of 1704 and 1744 both enforced the principle of the rule with the utmost stringency. Whatever may have been the state of current opinion before the beginning of the French revolutionary wars, the rule of 1756 was then revived in more than its former strength.

Its extension in  
1793.

There can be no question that a special privilege such as that enjoyed by the Dutch, exposes the neutral to be suspected of collusion with the belligerent whose favours he accepts; and that he cannot complain if the enemy of his friend forms a harsh judgment of his conduct. The matter stands otherwise if a trade is opened to all neutrals indifferently. In 1793, however, the French having opened their coasting and colonial trade to neutrals, the latter were not only forbidden by England to carry French goods between the mother-country and her colonies, or to engage in her coasting trade<sup>1</sup>, but they were also exposed to penalties for conveying neutral goods from their own ports to those of a belligerent colony, or from any one port to another belonging to the belligerent country. The reasons for this severity may be gathered from the judgments of Lord Stowell. It was considered that a belligerent would not relax a system of such importance as that under which he retained in his own hands the coasting and colonial traffic, unless he felt himself to be disabled from carrying it on; that under such circumstances the neutral must be aware that he was assisting one of the two parties to the war in a peculiarly effective manner; 'was it,' in fact, 'possible to describe a more direct and more

and the Empire, 1725 (ib. ii. 115), and France and the United States, 1778 (De Martens, Rec. ii. 598).

<sup>1</sup> It was the rule of English prize courts to give freight to the neutral carrier when enemy's goods in his custody were seized. The prohibition to trade with belligerent goods between belligerent ports entailed as its practical effect the withdrawal of this indulgence.

effectual opposition to the success of hostilities, short of actual military assistance?' With respect to colonial trade, there was a further reason. Colonies were often dependent for their existence on supplies from without; if they could not be supplied and defended by their owner, they fell of necessity to the belligerent who had incapacitated him from holding the necessary communication with them. What right had a third party to step in and prevent the belligerent from gathering the fruit of his exertions? These arguments, taken alone, would be equally valid against any trade in innocent commodities, the possession of which might be accidentally valuable to a belligerent; but they were really rooted in the assumption that a neutral is only entitled to carry on trade which is open to him before the war. Upon him lies the burden of proving that his new trade is harmless to the belligerent; and if he fails in this proof, the support which he affords to the enemy may be looked upon as intentionally given. The justice of this doctrine was strongly contested by the American government; it has since remained a subject of lively debate in the writings of publicists<sup>1</sup>; and it cannot be said to have been sanctioned by sufficient usage to render such debate unnecessary. Nor is it easy to see that the question has necessarily lost its importance to the degree which is sometimes thought. The more widely the doctrine is acted upon that enemy's goods are protected by a neutral vessel, the more necessary it is to determine whether

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<sup>1</sup> See Wheaton, i. Append. Note iii. for a detailed history of the practice during the Seven Years' War, and those of the American and French Revolutions. Mr. Justice Story thought coasting trade to be too exclusively national for neutrals to be permitted to engage in it, and was 'as clearly satisfied that the colonial trade between the mother-country and the colony, when that trade is thrown open merely in war, is liable in most instances to the same penalty;' but he objected to the further extension of the rule which forbade all intercourse with the colony. The English writers, Manning (267), Phillimore (iii. § ccxxv), uphold the principle of the rule, and Heffter (§ 165), though clearly disliking the rule, treats it as fairly established; Wheaton (pt. iv. chap. iii. § 27), Kent (Lect. v), and Ortolan (lib. iii. chap. v) come to no definite conclusion; Bluntschli (§ 799-800), Gessner (266-77), Calvo (§ 1100) pronounce for the legality of the prohibited commerce.

PART IV. it ought to be governed in a particular case by exceptional  
 CHAP. IV. considerations.

The arguments which may be urged on behalf of the right of neutrals to seize every occasion of extending their general commerce do not seem to be susceptible of a ready answer. Neutrals are in no way privy to the reasons which may actuate a belligerent in throwing open a trade which he has previously been unwilling to share with them; they can be no more bound to enquire into his objects in offering it to them than they are bound to ask what it is proposed to do with the guns which are bought in their markets. The merchandise which they carry is in itself innocent, or is rendered so by being put into their ships; in the case of coasting trade they take it to ports into which they can carry like merchandise brought from a neutral harbour; and the obstructing belligerent is unable to justify his prohibition by any military strength which it confers upon him. On the one hand the neutral is free from all belligerent complicity with a party to the war; on the other the established restrictive usages afford no analogy which can be extended to cover the particular case.

Heads of  
law.

§ 235. The above being the only exceptions from the general rule that permitted restraints upon neutral trade flow from a right conceded to the belligerent to prevent his military operations from being obstructed, it is evident that such differences as may exist in other matters between the practices and the doctrines on the subject which are in favour with various nations, arise not from disagreement as to the ground principles of law, but as to the extent or the mode of their application. It is admitted in a general sense that a belligerent may restrain neutral commerce, but it is disputed whether he may interfere at all with certain kinds of trade, and with respect to others how far his rights extend. In one or other of these ways each of the divisions of trade before mentioned has been, or still is, the subject of lively controversy; and in the following chapters it will

therefore be necessary to examine each in more or less of detail.

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The law affecting them may be divided into the following heads :—

- i. That which deals with forbidden goods, viz. articles contraband of war.
- ii. That which deals with forbidden carriage in its subdivisions of
  1. Carriage of analogues of contraband, viz. persons and despatches affected with a specially dangerous character.
  2. Carriage of goods to forbidden places ; i.e. to places under blockade.
- iii. That which deals with neutral goods entrusted to or under the protection of a belligerent.

Together with the law belonging to the second head, must be mentioned the prohibition to carry goods belonging to a belligerent, which though no longer a dominant rule, is not yet so fully abandoned that it can be passed by in silence.

Finally, it is convenient to treat separately the law of visit and seizure, or the means which a belligerent is authorised to take in order to establish that a neutral trader can be affected by penalties for any of the above reasons.



## CHAPTER V.

### CONTRABAND.

PART IV. § 236. THE privilege has never been denied to a belligerent  
CHAP. V. of intercepting the access to his enemy of such commodities  
Uncer- as are capable of being immediately used in the prosecution  
tainty of of hostilities against himself. But at no time has opinion  
usage as been unanimous as to what articles ought to be ranked as  
to what objects are being of this nature, and no distinct and binding usage  
included in being of this nature, and no distinct and binding usage  
contra- has hitherto been formed, except with regard to a very re-  
band. stricted class.

Views of  
Grotius.

Grotius placed all commodities under three heads. 'There are some objects,' he says, 'which are of use in war alone, as arms; there are others which are useless in war, and which serve only for purposes of luxury; and there are others which can be employed both in war and in peace, as money, provisions, ships, and articles of naval equipment. Of the first kind it is true, as Amalasuintha said to Justinian, that he is on the side of the enemy who supplies him with the necessaries of war. The second class of objects gives rise to no dispute. With regard to the third kind, the state of the war must be considered. If seizure is necessary for defence, the necessity confers a right of arresting the goods, under the condition however that they shall be restored unless some sufficient reason interferes<sup>1</sup>.' The division which was made

<sup>1</sup> 'Sunt res quae in bello tantum usum habent, ut arma: sunt quae in bello nullum habent usum, ut quae voluptati inserviunt: sunt quae et in bello et

by Grotius still remains the natural framework of the subject. PART IV.  
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 Objects which are of use in war alone are easy to enumerate and to define. They consist of arms and ammunition, the lists of which, as contained in treaties, remain essentially the same as in the eighteenth century. The only variations which time has introduced have followed the changes in the form and names of weapons. As to this head therefore there is no difference of opinion; but beyond it certainty is at once lost. The practice of different nations has been generally determined by their maritime strength, and by the degree of convenience which they have found in multiplying articles, the free importation of which they have wished to secure for themselves, or to deny to their enemy. Frequently, they have endeavoured by their treaties to secure immunity for their own commerce when neutral, and have extended the list of prohibited objects by proclamation so soon as they became belligerent.

§ 237. Of the treaties concluded by the United Provinces with England, France, Spain, and Sweden, between 1646 and the end of the seventeenth century, only three contained articles classing as contraband any other commodities than munitions of war. In these three the addition of horses was made. In four treaties provisions, and in two naval stores, were expressly excluded<sup>1</sup>. But in 1652, being at war with England, and again in 1657 with Portugal, they issued edicts placing articles of naval construction in the list of contraband; in the beginning of each subsequent war a like edict

Practice in  
the seven-  
teenth  
century.

The United  
Provinces.

*extra bellum usum habent, ut pecuniae, comventus, naves et quae navibus adsunt. In primo genere verum est dictum Amalasuinthae ad Justinianum, in hostium esse partibus qui ad bellum necessaria hosti administrat. Secundum genus querelam non habet. In tertio illo genere usus ancipitis distinguendus erit belli status. Nam si tueri me non possum nisi quae mittuntur intercipiam, necessitas jus dabit, sed sub onere restitutionis nisi causa alia accedat.* De Jure Belli et Pacis, lib. iii. c. i. § 5.

<sup>1</sup> With France, 1646 (Dumont, vi. i. 342); Spain, 1650 (ib. 570); England, 1654 (ib. ii. 74); England, 1668 (id. vii. i. 74); England, 1674 (ib. 282); England, 1675 (ib. 288); Sweden, 1675 (ib. 316); France, 1678 (ib. 357).

PART IV. was promulgated, and in 1689 a further enlargement embraced grain and provisions of every sort <sup>1</sup>.

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—  
England. The stipulations of the treaties entered into by England were more varied than those by which Holland was bound. In one provisions were stated to be contraband; in two they were excluded. Horses and soldiers were included in three, and money and ships in two; on the other hand materials of naval construction were excluded in one <sup>2</sup>.

There is some reason to believe that the accepted English list of contraband articles varied considerably during the century. In 1626, it appears from letters of the Maréchal de Bassompierre, then ambassador in London, that the English negotiators with whom he treated counted amongst the number metals, money, timber, and provisions <sup>3</sup>; but in 1674, Sir Leoline Jenkins, in reporting to the King upon a case in which English pitch and tar, carried in a Swedish vessel, had been captured and taken into Ostend for adjudication, said that 'these goods, if they be not made unfree by being found in an unfree bottom, cannot be judged by any other law but by the general law of nations. I am humbly of opinion that nothing ought to be judged contraband by that law in this case but what is directly and immediately subservient to the use of war, except it be in the case of besieged places, or of a general certification by Spain to all the world that they will condemn all the pitch and tar they meet with <sup>4</sup>.' It would seem therefore that, in the opinion of the chief English authority on international law in the latter end of the century, articles of direct use for warlike purposes were alone contraband under the common law of nations, but that each state, in order to meet the special conditions of a par-

<sup>1</sup> Bynk. Quæst. Jur. Pub. lib. i. c. x.

<sup>2</sup> Besides the conventions mentioned above, England concluded treaties with Sweden, 1654 (Dumont, vi. ii. 80); France, 1655 (ib. 121); Sweden, 1661 (ib. 385); Sweden, 1666 (id. vi. iii. 83); Spain, 1667 (id. vii. i. 31); France, 1667 (ib. 327).

<sup>3</sup> Ortolan, ii. 185.

<sup>4</sup> Wynne, Life of Sir Leoline Jenkins, ii. 751.

tical war, possessed the right of drawing up at its opening a list of articles to be contraband during its continuance.

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France was insignificant as a naval power till the war of 1672, and the larger number of her treaties have already been mentioned in speaking of England and Holland. One which was entered into with the Hanse Towns in 1655 is to be noted as including horses and naval stores, while excluding provisions; and the Peace of the Pyrenees was silent as to naval stores, and coincided in its stipulations as regards horses and provisions with the treaty of 1655<sup>1</sup>. In 1681, the Ordonnance de la Marine, which has been generally looked upon as fixing French law upon the matter, laid down that 'arms, powder, bullets, and other munitions of war, with horses and their harness, in course of transport for the service of our enemies, shall be confiscated<sup>2</sup>.'

France.

§ 238. The eighteenth century was opened with the inclusion of naval stores by France in 1704, but on the whole French practice was sufficiently consistent. Its treaties invariably stated munitions of war and saltpetre to be contraband, and with one exception they included horses; but they all expressly excluded provisions; except in one case they refused to admit into the list money and metals; in two cases materials of naval construction are unmentioned, and in only one treaty, made in 1742, are they specifically included. The treaties made with the United States in 1778, with England in 1786, and with Russia in 1787, also excluded ships. The practice of Spain has been identical in principle with that of France.

Practice  
in the  
eighteenth  
century.

The treaties concluded by Great Britain during the eighteenth century in the main followed the terms of the Treaty of Utrecht, which embodied the French doctrine of contraband; they all excluded provisions, and confiscated saltpetre; six include horses, two are silent with respect to them, and one with Russia—a state which seems to have

England.

<sup>1</sup> Dumont, vi. ii. 103 and 64.

<sup>2</sup> Valin, Ord. de la Marine, ii. 264.

PART IV. made a point of securing free trade in horses—strikes them  
 CHAP. V. from the list by name. In five cases no mention is made  
 — of money or metals; in three both, and in one money alone,  
 are excluded. Naval stores are unmentioned in five treaties;  
 by the rest commerce in them is permitted.

These treaties bound England at different times with France, Spain, Sweden, Russia, Denmark, and the United States, but they in no way expressed the policy of the country as apart from special agreement; and their principles were not acted upon in dealing with states with which no convention existed. Thus a larger part of Europe was usually exposed to the operation of English private regulations than was protected by treaty from the effects of her maritime predominance. In the end of the Seven Years' War, for example, Sweden and the United Provinces were the only countries with which any limiting treaty remained in force. Towards Russia, Denmark, the Hanse Towns, Mecklenburg, Oldenburg, Portugal, the Two Sicilies, Genoa, and Venice, she might act in accordance with her general views of belligerent rights<sup>1</sup>; and these seem then, as afterwards, to have permitted the list of contraband articles to be enlarged or restricted to suit the particular circumstances of the war<sup>2</sup>.

The Baltic  
 Powers.

The Baltic Powers are said by Wheaton to have been at issue with England during the whole of the eighteenth century with respect to the contraband character of naval stores<sup>3</sup>. But though Sweden concluded a treaty with Great Britain in 1720, by which materials of naval construction were declared not to be contraband, her own ordinance of 1715 includes all articles 'which can be employed for war<sup>4</sup>.' Russia agreed with the United Provinces in 1715, that naval stores should be taken to be contraband, and made a treaty with England

<sup>1</sup> The clause forbidding trade in contraband in the treaty with Denmark of 1670 is not inconsistent with the inclusion of anything useful to the enemy of the contracting parties.

<sup>2</sup> The Jonge Margaretha, i Rob. 193.

<sup>3</sup> Elements, pt. iv. chap. iii. § 24.

<sup>4</sup> v Wheaton, Appendix, 75.

in 1766, in which the question is left open. Denmark on the other hand excluded naval stores by her treaty of 1701 with the United Provinces, but made them contraband by a regulation issued in 1710 during war with Sweden<sup>1</sup>, as well as by treaty with France in 1742, and with England in 1780. Down to the time of the First Armed Neutrality therefore, the practice of the three northern states does not seem to have been characterised by definite purpose. Holland maintained her policy of varying the lists of contraband articles at pleasure until the middle of the eighteenth century, when the diminution of her naval power carried her from among the advocates of belligerent privilege into those of neutral rights.

The writers of the period were not more consistent with each other than was practice with itself. Heineccius, writing in 1721, ranked as contraband of war not only munitions of every kind, saltpetre, and horses, but cordage, sails, and other naval stores, together with provisions<sup>2</sup>. Bynkershoek on the other hand strives to limit the number of prohibited commodities as rigidly as is possible, consistently with the rules applied by his nation. He lays down broadly that everything is contraband which may be employed by belligerents for purposes of war, whether it is a completed instrument of war, or some material in itself suitable for warlike use. What articles however he intends to indicate by the second clause

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Publicists  
of the  
eighteenth  
century.

<sup>1</sup> Valin, *Ord. de la Marine*, ii. 264.

<sup>2</sup> 'In quibus mercibus vetitis accenseri animadvertimus omnia arma ignivoma, eorumque adparatus, qualia sunt tormenta, bombardae, mortaria, betardae, bombi, granatae, circuli picei, tormentorum sustentacula, furcae, balthei, pulvis nitratus, restes igni capiendo idoneae, sal nitrum, globi, item hastae, gladii, galeae, cassides, loricae, bipennes, spicula, equi, ephippia, aliaque instrumenta bellica. Quin et triticum, hordeum, avena, legumina, sal, vinum, oleum, vela, restes, et siqua alia ad adparatum nauticum pertinent. . . Ceterum sunt quaedam de quibus inter gentes aliquando disceptatum est, an mercibus vetitis sint accensenda. Sic de vaginis aliquando dubitatum. . . . Vaginis non minus opus est hosti quam gladiis; et quamvis vaginis non vulneret aut stragem edat; inutiles tamen essent ipsi gladii futuri, nisi vaginae eos a pluvia et rubigine tuerentur. Eadem ergo ratio, quae vela, restes nauticas, frumenta, prohiberi suasit, ipsis etiam vaginis facile poterit accommodari.' *De Nav. ob Vect. Merc. Vetit. Comm.* xiv.

PART IV. of his description is not very evident, for he immediately  
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 — expresses a doubt whether the material is contraband out of which something may be fitted for war. Descending to particulars, he allows materials for building ships to be confiscated if the enemy is in urgent need of them; saddles, scabbards, and such articles, he is ready to condemn unless they are in numbers so small as not apparently to be intended for hostile use; as regards saltpetre he seems to leave the question open<sup>1</sup>. It is important, as Sir R. Phillimore remarks, that Bynkershoek adopts the principle of considering the circumstances of each case, and that the list of contraband articles must therefore, according to him, be variable. Vattel enumerates 'arms and munitions of war, timber, and everything which serves for the construction and armament of vessels of war, horses, and even provisions, on certain occasions when there is hope of reducing the enemy by famine<sup>2</sup>.' Valin, writing in 1766, says that 'tar has also been declared to be contraband, with pitch, resin, sailcloth, hemp, and cordage, masts and shipbuilding timber. Thus, apart from their contravention of particular treaties, there is no reason to complain of the conduct of the English, for by right these things are now contraband, and have been so from the beginning of the century, though formerly the rule was otherwise<sup>3</sup>.' Lampredi reduces contraband mer-

<sup>1</sup> 'Excute pacta gentium, quae diximus, excute et alia quae alibi exstant, et reperies, omnia illa appellari contrabanda, quae, uti hostibus suggeruntur, bellis gerendis inserviunt, sive instrumenta bellica sint, sive materia per se bello apta. . . . Atque inde judicabis, an ipsa materia rerum prohibitarum quoque sit prohibita? Et in eam sententiam, si quid tamen definiat, proclivior esse videtur Zoucheus' (De Jure Feciali, pt. ii. s. vii. q. 8). 'Ego non essem, quia ratio et exempla me movent in contrarium. Si omnem materiam prohibeas, ex qua quid bello aptari possit, ingens esset catalogus rerum prohibitarum, quia nulla fere materia est, ex qua non saltem aliquid, bello aptum, facile fabricemus. Hac interdicta, tantum non omni commercio interdicimus, quod valde esset inutile. . . . Quandoque tamen accidit, ut et navium materia prohibeatur, si hostis ea quam maxime indigeat, et absque ea commode bellum gerere haud possit.' Quæst. Jur. Pub. lib. i. c. x.

<sup>2</sup> Droit des Gens, liv. iii. chap. vii. § 112.

<sup>3</sup> Ord. de la Marine, ii. 264.

chandise to those articles only, 'which are so formed, adapted, and specialised as to be unfit to serve immediately and directly for other than warlike use<sup>1</sup>.' He appears to ground his doctrine upon the language of treaties. On comparing the jarring opinion of these different authors with the treaties which have been enumerated and with the indications of unilateral practice which here and there occur in history, it seems to stand out with tolerable clearness that no distinct rule existed in the eighteenth century with regard to the classification of merchandise as innocent or as contraband. On the one hand, there is no doubt that France thought it to her interest to restrict the number of articles classed under the latter head; on the other, it is as evident that England wished to preserve entire freedom of action; but the position of other nations is not so certain, and the extended catalogues which were sanctioned by a German, a Swiss, and a Frenchman must have been grounded on a wider opinion than could be evidenced by the practice of England and Holland alone.

It was natural, however, that the secondary maritime powers should in time accommodate their theories to their interests. They were not sure of being able as belligerents to enforce a stringent rule; they were certain as neutrals to gain by its relaxation. Accordingly, in 1780 Russia issued a Declaration of neutral rights, among the provisions of which was one limiting articles of contraband to munitions of war and sulphur<sup>2</sup>. Sweden and Denmark immediately adhered to the Declaration of Russia, and with the latter power formed the league known as the First Armed Neutrality. Spain, France, Holland, the United States, Prussia, and Austria, acceded to the alliance in the course of the following year. Finally it was joined in 1782 by Portugal, and in 1783 by the Two Sicilies.

It is usual for foreign publicists to treat the formation

<sup>1</sup> *Del Commercio dei Popoli Neutrali in Tempo di Guerra*, 70.

<sup>2</sup> See Appendix vii.



**PART IV.** of the Armed Neutrality as a generous effort to bridle the  
**CHAP. V.** aggressions of England, and as investing the principles expressed in the Russian Declaration with the authority of such doctrines as are accepted by the body of civilised nations. It is unnecessary to enter into the motives which actuated the Russian government<sup>1</sup>; but it is impossible to admit that the doctrines which it put forward received any higher sanction at the time than such as could be imparted by an agreement between the Baltic Powers. The accession of France, Spain, Holland, and the United States was an act of hostility directed against England, with which they were then at war, and was valueless as indicating their settled policy, and still more valueless as manifesting their views of existing international right. It was the seizure by Spain of two Russian vessels laden with wheat which was the accidental cause of the original Declaration, and within a few months of adhering to the league France had imposed a treaty upon Mecklenburg, and Spain had issued an Ordinance, both of which were in direct contradiction to parts of the Declaration<sup>2</sup>. The value of Russian and Austrian opinion in the then position of those countries as maritime powers is absolutely trivial. Whatever authority the principles of the Armed Neutrality possess, they have since acquired by inspiring to a certain but varying extent the policy of France, the United States, Russia, and the minor powers.

**France.** On the outbreak of war between France and England in 1793, the Convention decreed that neutral vessels laden with provisions destined to an enemy's port should be brought in for preemption of the cargo<sup>3</sup>, although treaties were then existent between France and the Hanse Towns, Hamburg,

<sup>1</sup> The intrigues which led to the issue of the Russian Declaration are sketched by Sir R. Phillimore, iii. § clxxxvi; see also Lord Stanhope, *Hist. of Eng.* chap. lxii.

<sup>2</sup> All the signatories to the Declaration of the Armed Neutrality violated one or other of its provisions when they were themselves next at war.

<sup>3</sup> Phillimore, iii. § cxlv. The decree was issued on May 9, and the English Instructions to the like effect were dated June 8.

the United States, Mecklenburg, and Russia, in which it was stipulated that provisions should not be contraband of war. But the Prize Courts seem to have acted upon the rules of the Ordinance of 1681<sup>1</sup>; and of the few treaties which have been concluded by France during the present century, only one varies from the form which is usual in her conventions<sup>2</sup>.

The conduct of the United States has been less consistent. Between 1778 and the end of the century they concluded four treaties, by which munitions of war, horses, and sulphur or saltpetre, or both, were ranked as contraband; and provisions, money and metals, ships and articles of naval construction, were declared to be innocent<sup>3</sup>. The treaty of 1794 with England includes naval stores among objects of contraband, and provides, when 'provisions and other articles not generally contraband are seized,' that they shall not be confiscated, but that the owner shall be indemnified<sup>4</sup>. But the government of the United States did not look upon provisions as incapable of entering the class of prohibited articles under special circumstances; for in 1793, while protesting against the Instructions issued by England in June of that year, it argued against them on the ground that provisions can only be contraband when carried to a place which is actually invested, and which therefore there is a well-founded expectation of reducing by famine<sup>5</sup>. And it fully recognised that materials of naval construction are contraband by the common usage of nations<sup>6</sup>. In a case arising out of the subsequent war with England, the Prize Courts of the United

<sup>1</sup> *Il Volante*, Pistoye et Duverdy, i. 409.

<sup>2</sup> The convention with Denmark made in 1842 includes naval stores. Phillimore, iii. § cclx.

<sup>3</sup> France, 1778 (*De Martens*, Rec. ii. 598); Holland, 1782 (*id.* iii. 451); Sweden, 1783 (*ib.* 569); Spain, 1795 (*id.* vi. 561).

<sup>4</sup> *De Martens*, Rec. v. 674.

<sup>5</sup> Mr. Randolph to Mr. Hammond, May 1, 1794, *American State Papers*, i. 450.

<sup>6</sup> Mr. Pickering to Mr. Pinckney, Jan. 16, 1797, *American State Papers*, i. 560.

PART IV. States held that provisions 'destined for the army or navy of the enemy, or for his ports of naval equipment,' were to be deemed contraband<sup>1</sup>.  
 CHAP. V.

Practice in  
the nine-  
teenth  
century.  
United  
States.

§ 239. In the present century a treaty of the United States with England retains naval stores and saltpetre, and is silent upon other points; another with Sweden includes sulphur and saltpetre, excluding naval stores; a third with France follows the terms affected by the latter power; and nine treaties, all contracted with American States, mention munitions of war and horses; and treat provisions, money, metals, ships, and articles of naval construction as innocent<sup>2</sup>. That with Mexico contains the special stipulation that provisions destined to a besieged port are to be excepted from the usual immunity. It would seem, on the whole, that the United States have always recognised the English doctrine of contraband to be more in consonance with existing usage than that of France, but that they have wished in certain cases to limit the application of the rule by express convention.

Second  
Armed  
Neutrality.

The practice of the Baltic States is of less interest, because the events of the revolutionary wars tended greatly to reduce their maritime importance; but before the antecedent conditions had been altered, Denmark varied the definition of contraband to which she had bound herself by issuing in 1793 a proclamation of neutrality, in which horses, and 'in a general way, articles necessary for the construction and repair of vessels, with the exception, however, of unwrought iron, beams, boards and planks of deal and fir, are declared to be contraband<sup>3</sup>.' The Second Armed Neutrality endeavoured to re-establish the doctrine of its predecessor; and

<sup>1</sup> *Maisonave v. Keating*, ii Gallison, 335; *The Commercen*, i Wheaton, 387.

<sup>2</sup> England, 1806 (*De Martens*, Rec. viii. 584); France, 1800 (*id.* vii. 202); Columbia, 1824 (*Nouv. Rec.* vi. 996); Sweden, 1827 (*id.* vii. 279); and in identical terms with Central America, 1826; Brazil, 1828; Chili, 1832; Venezuela, 1836; Peru-Bolivia, 1836; Ecuador, 1839; New Grenada, 1848. The treaty with Mexico was made in 1831 (*Nouv. Rec.* x. 338).

<sup>3</sup> *v* Wheaton, Appendix 76.

part of the compromise which after its destruction was effected between the views of Russia and of England consisted in the recognition of the northern enumeration of prohibited articles; but in 1803 a fresh agreement was concluded between England and Sweden by which coined money, horses, ships, and manufactured articles serving immediately for their equipment, were declared liable to confiscation, while naval stores, the produce of either country, were to be brought in for pre-emption<sup>1</sup>. Since then the only treaties concluded by any of the Baltic States which materially deviate from the principles of the Armed Neutrality, are that made at Orebro between England and Sweden in 1812, which includes horses, money, and ships, and that signed between England and Denmark in 1814, by which naval stores as well as horses are declared to be contraband<sup>2</sup>.

Besides the treaties already mentioned, Great Britain has only twice entered into special agreements with reference to contraband since the beginning of the present century<sup>3</sup>; and as almost all her previous contracts have been dissolved by war, her practice is mainly to be sought in the decisions of her Prize Courts. These persistently carried out, through the whole of the Revolutionary and Napoleonic wars, the traditional principles upon which England had always before acted, of classing as contraband not merely articles susceptible only of warlike employment, but also a large number of those *incipitis usus*.

§ 240. In presence of the foregoing facts some modern writers can assert with curious recklessness, that England

PART IV.  
CHAP. V.

Great  
Britain.

Opinions  
of modern  
publicists.

<sup>1</sup> De Martens, Rec. viii. 91.

<sup>2</sup> De Martens, Nouv. Rec. i. 432 and 680. The other treaties made by the Baltic powers during the present century are as follows: Denmark and Prussia, 1818 (De Martens, Nouv. Rec. iv. 534); Denmark and Brazil, 1828 (id. vii. 614); Sweden and the United States, 1827 (ib. 279); Prussia and Brazil, 1827 (ib. 470); Prussia and Mexico, 1831 (id. xii. 534).

<sup>3</sup> With Portugal in 1820, when munitions of war, sulphur, horses, money, and naval stores were classed as contraband; and with Brazil in 1827, when munitions of war and naval stores only were enumerated. De Martens, Nouv. Rec. iii. 211, and vii. i. 486.

**PART IV.** is the only power which for more than a century has refused  
**CHAP. V.** to identify articles of contraband with munitions of war<sup>1</sup>. Kent, Wheaton, and Manning<sup>2</sup>, on the other hand, state the results of custom with perhaps somewhat too exclusive a reference to English and American practice, and without sufficient endeavour to classify the objects which in a different measure and in their divers ways have been included among the prohibited acts.

Ortolan refrains from forcing usage into any definite conclusion, but from an abstract point of view owns himself to be 'of the opinion of those who think that the freedom of neutral commerce ought to furnish the general principle, to which only such restrictions should be applied as are an immediate and necessary consequence of the state of war between the belligerents.' His 'opinion with regard to contraband of war, looking at the question in a rational manner, is therefore that—

' 1. Arms and instruments of war, and munitions of every kind directly serving for the use of those arms, are the only objects generally and necessarily contraband of war.

' 2. Raw materials or merchandise of every kind fitted for peaceful use, even though equally capable of being employed in the manufacture or application of arms, instruments and munitions of war, are not strictly comprised in this contraband. It is at most permitted to a belligerent power, in view of some special circumstance affecting its military operations, to treat

<sup>1</sup> Gessner, 81; Hautefeuille, tit viii. sect. ii. § 3. The process by which M. Hautefeuille arrives at his conclusions has the merit of boldness. He finds in the imaginary 'loi primitive,' to which he refers in every page with wearisome iteration, that contraband of war is 'expressly' confined to arms, &c. His assumption is readily supported by treaties from the list of which those which conflict with his theory are excluded as destitute of authority; and he provides against the interference of unilateral acts by a like rejection of everything which militates against the simple dictates of the divine will. He is obliged, however, to admit that the divine law has not been strong enough to prevent the entry of saltpetre and horses into the established list of contraband.

<sup>2</sup> Kent, Comm. lect. vii; Wheaton, Elem. pt. iv. chap. iii. § 24; Manning, chap. vii.

such articles as contraband, but they ought only to be so assimilated as a rare exception, which should be limited to those cases in which they in fact form a disguised contraband, that is to say, in which they are tainted with fraud.

PART IV.  
CHAP. V.

‘3. Provisions and all other objects of first necessity are incapable of being included in any case, or for any reason, among goods contraband of war <sup>1</sup>.’

M. Bluntschli enumerates ‘guns, muskets, swords, balls, bullets, powder, and other material of war; saltpetre and sulphur; ships of war;’ and adds that though the transport of articles such as ‘money, horses, timber for naval construction, sail-cloth, iron plates, engines, coal, and merchant vessels, is as a rule authorised; such objects may be looked upon as contraband under the express sanction of treaties, or if in the particular case it can be shown that they are destined to be used in an existing war, and that they are carried to one of the belligerents with the intention of rendering him aid <sup>2</sup>.’

‘The idea of contraband,’ says M. Heffter, ‘is complex, variable according to time and circumstance, and hard to fix in a permanent and absolute form. . . . Universal usage limits contraband to arms, implements, and munitions of war, in other words to objects made and fashioned exclusively for use in war, and not to raw materials suited to the fabrication of the prohibited objects. . . . There is another class of articles which are indicated as objects of contraband, in treaties and in the special regulations of several countries.’ This includes horses; all raw materials suited for the manufacture of arms and munitions of war, iron, brass, steel, saltpetre, sulphur, and naval stores, such as timber, hemp,

<sup>1</sup> Dip. de la Mer, ii. 190.

<sup>2</sup> Droit International, § 803-5. Dana, with the strong common sense which distinguishes him, says: ‘The intent of the owner is not the test. The right of the belligerent to prevent certain things from getting into the military use of his enemy is the foundation of the law of contraband; and its limits are in most cases the practical result of the conflict between this belligerent right on the one hand, and the right of the neutral to trade with the enemy on the other.’ Note to Wheaton, No. 226.

PART IV. and tar, provisions, and finally gold, silver, and copper,  
 CHAP. V. whether coined or in ingots. 'In the same category must be ranked some fresh articles which the progress of science has applied in our days to the requirements of war. Such are engines, coal, &c. It cannot be maintained that commodities of the latter class necessarily bear the stamp of contraband. A belligerent can only interfere with them when neutral trade, in conveying them to the enemy, affords to the latter succour of a manifestly hostile nature<sup>1</sup>.'

Contra-  
band can-  
not be  
limited to  
munitions  
of war.

§ 241. The language of each of the above writers distinctly involves the proposition that contraband of war cannot be limited to munitions of war, and that the articles composing it must vary with the special circumstances of particular cases. This proposition is the simple expression of common sense. There can be no question that many articles, of use alike in peace and war, may occasionally be as essential to the prosecution of hostilities as are arms themselves; and the ultimate basis of the prohibition of arms is that they are essential. The reason that no difference of opinion exists with respect to them is the fact that they are in all cases essential.

But it may also happen, after a remote non-manufacturing country, such as Brazil, has suffered a disaster at sea, that to prevent the importation of marine engines would be equivalent to putting an end to the war, or would at least deprive the defeated nation of all power of actively annoying its enemy. In considering the matter logically therefore, the true difficulty is the test of essentiality. Under what circumstances can the seizure of merchandise of double use be justified? On this point MM. Ortolan, Bluntschli, and

<sup>1</sup> *Le Droit International*, § 160. I do not feel sure that I apprehend M. Heffter's meaning in the last paragraph. The original is as follows:—'On ne saurait prétendre que ces objets portent nécessairement le caractère de contrebande. C'est seulement dans le cas où, par leur transport vers l'un des belligérants, le commerce neutre prend le caractère de secours manifestement hostile, que l'autre belligérant a le droit d'empêcher de fait.' The conveyance to a belligerent, which is here mentioned as the condition of an exceptional character being occasionally imprinted upon certain merchandise, is the condition also of the contraband character of munitions of war.

Heffter alike display some vagueness, part of which is no doubt inevitable where the innocence or noxiousness of an article is determined by the external circumstances under which it is supplied, but part of which seems also to spring from the adoption of intent as a test of character.

PART IV.  
CHAP. V.Principle  
of classifi-  
cation  
of contra-  
band.

The principle that the right to class a particular object as contraband is intimately bound up with the fact of its possession being essential to the belligerent for his warlike purposes will scarcely be contested by any publicist. The belief that no article except munitions of war can be so essential as to warrant interference with trade appears to underlie the doctrine of one school of writers; the statement that the contrary is true is explicitly made by the adherents of the opposite opinion; but these are mere differences of opinion as to the value of facts; upon the question of theory there is general agreement. The policy of nations, on the other hand, has been governed by no principle. The wish to keep open their own or a foreign market has usually been a motive quite as powerful as the hope of embarrassing an enemy, and it has led to a thoroughly confused practice. Usage does not conform to principle, and at the same time no sufficient rule can be extracted from it. In such a state of things it is evidently best to appeal to principle in the first instance and to regard practice as of secondary value. If this be done, although no great precision can from the nature of things be obtained, it will be possible to classify articles other than munitions of war to some extent according to the greater or less intimacy of their association with warlike operations, and consequently, according to the less or greater urgency of circumstance under which a belligerent may fairly prevent their access to his enemy; it being in all cases understood that if any usage is strong enough to weigh in favour of a particular custom it shall receive its full value.

§ 242. Horses, saltpetre and sulphur, may be placed first as subjects of the widest usage. It has always been the practice of England and France to regard horses as contra-

Horses.  
Saltpetre.  
Sulphur.



PART IV. band ; in a very large number of treaties they are expressly  
 CHAP. V. included ; in none are they excluded except in a few contracted  
 by Russia, and in those between the United States and other  
 American countries, the latter however confining the pro-  
 hibition to calvary mounts. M. Bluntschli treats this limi-  
 tation as a matter of international rule, without explaining in  
 what way horses used for artillery or transport are less  
 noxious than those employed in the cavalry, or how it can be  
 determined for which use they are intended<sup>1</sup>. Under the  
 mere light of common sense the possibility of looking upon  
 horses as contraband seems hardly open to argument. They  
 may no doubt be imported during war-time for agricultural  
 purposes, as powder may be used for fireworks ; but the  
 presumption is certainly not in this direction. To place an  
 army on a war-footing often exhausts the whole horse reserve  
 of the country ; the subsequent losses must be supplied from  
 abroad, and more necessarily so as the magnitude of armies  
 increases. Almost every imported horse is probably bought  
 on account of the government ; if in rare instances it is not,  
 some other horse is at least set free for belligerent use.

The amount of authority and of reason in favour of in-  
 cluding saltpetre and sulphur is approximately the same as that  
 which governs the case of horses. But there are no treaties  
 in which these commodities are expressly excluded.

<sup>1</sup> The Russian treaties are those of 1766 with England, and those of 1780-2  
 with Sweden, Denmark, Portugal, Prussia, Austria, and Holland. Bluntschli,  
 § 805 ; Valin, *Ord. de la Marine*, ii. 264. See also Vattel, liv. iii. chap. vii.  
 § 112 ; Kent, lect. vii ; Manning, 355 ; Calvo, § 1112, who sustains the contra-  
 band character of horses ; and on the other side Hübner, who makes a like  
 distinction with Bluntschli, and Hautefeuille (tit. viii. sect. ii. § 6), who takes  
 refuge from treaties in primitive law.

The military administration in Germany is apparently less inclined than  
 publicists of that country to regard the acquisition of horses by an enemy as  
 unimportant. In 1870 Count Bismarck complained to Lord A. Loftus that the  
 'export of horses from England under existing circumstances provided the  
 enemy of Prussia with the means of carrying on a war with a power in amity  
 with Great Britain.' State Papers, No. 3, 1870, Franco-Prussian War.  
 Horses are included in an Austrian ordinance of 1864, which in other respects  
 limits contraband to munitions, &c., saltpetre, and sulphur. Calvo, § 1039.

§ 243. Materials of naval construction, e.g. ship timber, masts, spars of a certain size in a manufactured state, marine engines, or their component parts, sailcloth, cordage, copper in sheets, hemp, tar, &c. have been deemed contraband by less general consent. English usage bars all such objects from reaching the enemy, but does not treat them as being all equally harmful. Manufactured articles are looked upon with more suspicion than raw material; and where commodities are the staple produce of the exporting country and owned by persons belonging to it, the penalty of confiscation is relaxed, and they are subjected only to pre-emption<sup>1</sup>. The American rule on the subject is identical with that of England, and the Confederates also acted upon it during the Civil War<sup>2</sup>. In the course of a dispute with Spain in 1797, the details of which are unimportant, the government of the United States laid down that 'ship timber and naval stores are by the law of nations contraband of war,' and the courts give expression to a like view. The custom of France has now become fixed in an opposite sense<sup>3</sup>. The policy of the Northern States, which have always exported their timber and tar, can only be confirmed by the modern necessity of importing machinery<sup>4</sup>. The views of the South American world are probably indicated by its treaties with the United States, the tenor of which is thoroughly in consonance with the interests of the southern nations. Writers are divided into two classes, the members of which correspond to those

PART IV.  
CHAP. V.Materials  
of naval  
construc-  
tion.

<sup>1</sup> *Jonge Margaretha*, i Rob. 193; *Maria*, i Rob. 373. So late as 1750 pitch and tar, the produce of Sweden, were confiscated by the English courts. *The Apollo*, iv Rob. 161; *The Twee Juffrowen*, iv Rob. 243.

During the Crimean war Sir J. Graham stated the opinion of the government that by the law of nations, timber, cordage, pitch, and tar could be dealt with as contraband of war. *Hansard*, 3rd series, vol. cxxxiv. 916.

<sup>2</sup> *Dana's Wheaton*, note No. 226; *The Commercen*, i *Wheaton*, 143; *Ortolan*, *Dip. de la Mer*, vol. ii. Appendix xxi.

<sup>3</sup> *Pistoye et Duverdy*, i. 445; *Il Volante*, ib. 409; *La Minerve*, ib. 410.

<sup>4</sup> The Swedish neutrality ordinance of 1854 only mentions as contraband munitions of war, saltpetre, and sulphur. *Neut. Laws Commissioners' Rep.*, Appendix iv.

PART IV. whose diverse opinions as to horses have already been cited.

CHAP. V.

In practice, therefore, the maritime authority of England and America is opposed by that of France, supported by a crowd of nations, the future nature or importance of the naval action of many of which cannot at present be foretold. Upon reasonable grounds it would appear that it must always be a matter of the highest and most immediate belligerent importance for a non-manufacturing state to import machinery in safety, and for a country poor in forests or in iron to be able to introduce ship timber and armour plates.

**Ships.**

The position occupied by vessels in modern practice has already been so fully discussed under the head of State Duties, that it does not seem necessary to recur to the subject.

**Coal.**

§ 244. Coal, owing to the lateness of the date at which it has become of importance in war, is the subject of a very limited usage. In 1859 and 1870 France declared it not to be contraband; and according to M. Calvo the greater number of the secondary states have pronounced themselves in a like sense. England on the other hand, during the war of 1870, considered that the character of coal should be determined by its destination, and though she refuses to class it, as a general rule, with contraband merchandise, vessels were prohibited from sailing from English ports with supplies directly consigned to the French fleet in the North Sea. Germany went further, and remonstrated strongly against its export to France being permitted by the English government<sup>1</sup>. The claim was extravagant, but the nation which made it is not likely to exclude coal from its list of contraband. The view taken by England seems to be that which is most appropriate to the uses of the commodity with which it deals. Coal is employed so largely, and for so great a number of innocent purposes, the whole daily life of many nations is so dependent on it by its use for making gas, for driving locomotives, and for the conduct of the most ordinary

<sup>1</sup> Calvo, § 1111; Bluntschli, § 805; Hansard, 3rd series, vol. cciii. 1094; State Papers, Franco-German War, 1870, No. 3.

industries, that no sufficient presumption of an intended warlike use is afforded by the simple fact of its destination to a belligerent port. But on the other hand, it is in the highest degree noxious when employed for certain purposes; and when its destination to such purposes can be shown to be extremely probable, as by its consignment to a port of naval equipment, or to a naval station, such as Bermuda, it is difficult to see any reason for sparing it which would not apply to gunpowder. One article is as essential a condition of naval offence as is the other<sup>1</sup>.

§ 245. The doctrine of the English courts at the commencement of the present century with respect to provisions was that 'generally they were not contraband, but might become so under circumstances arising out of the particular situation of the war, or the conditions of the parties engaged in it<sup>2</sup>.' Grain, biscuit, cheese, and even wine, when on their way to a port of naval equipment or to a naval armament, were condemned, and, as has already been seen, the same practice was followed by the courts of the United States<sup>3</sup>. In 1793 and 1795, the English government indefensibly extended the application of the doctrine to the point of seizing all vessels laden with provisions which were bound to a French port, alleging as their justification that there was a prospect of reducing the enemy by famine. A serious disagreement occurred in consequence with the United States, which maintained that provisions could only be treated as contraband when destined for a place actually invested or blockaded; and the point remained wholly unsettled by the Treaty of 1794, which, while recognising that provisions, under the existing law of nations, were capable of acquiring the taint

<sup>1</sup> The above view is that which was taken by Lords Brougham and Kingsdown in 1861 in a discussion in the House of Lords upon the Proclamation of Neutrality issued by the English government at the outbreak of the American Civil War. Hansard, 3rd Series, vol. clxii. 2084 and 2087.

<sup>2</sup> The *Jonge Margaretha*, 1 Rob. 193.

<sup>3</sup> The *Ranger*, vi Rob. 125; The *Edward*, iv Rob. 69. For the American practice, see ante, p. 573.

PART IV. of contraband, did not define the circumstances under which  
 CHAP. V. the case would arise<sup>1</sup>. The excesses of the English government cast discredit on the doctrines under the shelter of which they screened themselves. Manning adopts it, but not without evident hesitation. Wheaton seems to think that provisions can only be contraband when sent to ports actually besieged or blockaded; and MM. Ortolan, Bluntschli, and Calvo declare this to be undoubtedly the case<sup>2</sup>. No nation except England has pushed its practice even to the point admitted in the American courts; nor can it be doubted for a moment, not only that the detention of provisions bound to a port of naval equipment is unauthorised by usage, but that it is unjustifiable in theory. To divert food from a large population, when no immediate military end is to be served, because it may possibly be intended to form a portion of supplies which in almost every case an army or a squadron could complete from elsewhere with little inconvenience, would be to put a stop to all neutral trade in innocent articles. But writers have been satisfied with a broad statement of principle, and they have overlooked an exceptional and no doubt rare case, in which, as it would seem, provisions may fairly be detained or confiscated. If supplies are consigned directly to an enemy's fleet, or if they are sent to a port where the fleet is lying, they being in the latter case such as would be required by ships, and not ordinary articles of import into the port of consignment, their capture produces an analogous effect to that of commissariat trains in the rear of an army. Detention of provisions is almost always unjustifiable, simply because no certainty can be arrived at as to the use which will be made of them; so soon as certainty is in fact established, they, and everything else which directly and to

<sup>1</sup> De Martens, Rec. v. 674.

<sup>2</sup> Manning, 361-72; Wheaton, Elem. pt. iv. chap. iii. § 24; Ortolan, Dip. de la Mer, ii. 191 and 216; Bluntschli, § 807; Calvo, § 1106. Phillimore (iii. § ccxvi-lviii) seems to look upon the practice of the English and American courts as being the most authoritative part of a confused usage.

an important degree contributes to make an armed force mobile, become rightly liable to seizure. They are not less noxious than arms; but except in a particular juncture of circumstances their noxiousness cannot be proved.

§ 246. Money and unwrought metals, and in general, clothing and its materials, are of like character with provisions, and may become contraband under similar conditions. But uniforms, soldiers' great coats, &c., present some difficulty; their destination and their use for warlike purposes is obvious, but on the other hand, they are not, under ordinary circumstances, of such necessity that the presence or absence of a particular consignment can be expected to affect in any way the issue of hostilities <sup>1</sup>.

PART IV.  
CHAP. V.Clothing,  
money,  
metals, &c.Penalties  
affecting  
contra-  
band.

§ 247. In strictness every article which is either necessarily contraband, or which has become so from the special circumstances of the war, is liable to confiscation; but it is usual for those nations who vary their list of contraband to subject the latter class to pre-emption only, which by the English practice means purchase of the merchandise at its mercantile value, together with a reasonable profit, usually calculated at ten per cent. on the amount. This mitigation of extreme belligerent privilege is also introduced in the case of products native to the exporting country, even when they are affected by an inseparable taint of contraband <sup>2</sup>.

<sup>1</sup> Manning (p. 358) thinks that metals and money are not contraband.

<sup>2</sup> Phillimore, iii. § cclxviii-lxx. Rules for ascertaining the value of the merchandise seized, and for other matters of detail connected with the practice, were laid down in the treaty between Great Britain and the United States in 1794, and in that between the former country and Sweden in 1803. MM. Heffter (§ 161) and Calvo (§ 1127) look upon pre-emption not as a mitigation but as an intensification of the privileges of a belligerent; but they start with assuming that it is only used with respect to articles not contraband of war. That much of the merchandise to which pre-emption was applied during the wars of the end of last century was not rightly considered to be contraband, does not alter the fact that, being considered to be contraband, it was lightly dealt with. M. Heffter however seems to admit that pre-emption may be permitted on payment not merely of ordinary mercantile profit, but of such profit as would probably be realised if the voyage were completed. M. Ortolan (ii. 220-30) understands the theory of the English practice, but is debarred by his views as

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CHAP. V.

Effect of  
contra-  
band on  
the vessel  
carrying it.

The injuriousness to a belligerent of contraband trade by a neutral, results from the nature of the goods conveyed, and not from the fact of transport. This distinction prevents the penalty which affects contraband merchandise from being extended as a general rule to the vessel in which it is<sup>1</sup>. Some writers consider that the neutral vessel has even a right to purchase the free continuance of her voyage at the price of abandoning to the belligerent whatever contraband goods she has on board, unless their quantity is so great that the captor cannot receive them. The existence of any such general right would be difficult to prove; but a large number of treaties have established the practice between certain nations<sup>2</sup>; and it was followed by the Confederate States

to the proper definition of contraband from recognising any occasions on which it could be exercised. M. Bluntachli (§ 806 and 811) thinks that '*contrebande de guerre ne peut être confisquée que lorsque les neutres prêtent secours et assistance à l'adversaire, c'est à dire lorsqu'ils agissent en ennemis; la saisie ne pourra avoir lieu lorsque les neutres font simplement du négoce.*' To use his own example, if coal is found to be on its way to a port where a belligerent fleet is at anchor, it may be detained on compensation being made to the owner, but it cannot be confiscated unless the intention of delivering it to the enemy's fleet can be proved. He is silent as to any different rule being applied to munitions of war. He does not state where the authority for this doctrine is to be found; but as its adoption would be tantamount to sweeping away the whole law of contraband, it can hardly be admitted on the word of a single writer, however distinguished he may be. An ostensible destination to a belligerent government agent or to an armed force would hardly ever be necessary; and it is needless to say that merchandise would in consequence never be open to condemnation. And as a market with a good profit would be certain, whether the adventure were captured or arrived at its destination, no check would exist by which the trader could be restrained. Finally, as the merchant would be without risk, the belligerent would be relieved from the necessity of paying war-prices for his goods.

<sup>1</sup> The ancient practice, except in France, where, until 1681, goods were only seized on payment of their value, was to confiscate both cargo and ship. The Neutralitet, iii Rob. 295. And to this Russia seems to adhere; Russian Declaration, 1854, quoted by Lawrence in note to Wheaton, 573. In some treaties the freedom of the ship is expressly stipulated, e.g. in that between Denmark and Genoa, 1789. De Martens, Rec. iv. 443.

<sup>2</sup> It is provided for in the treaties between Russia and Denmark, 1782 (De Martens, Rec. iii. 476); the United States and Sweden, 1783 (ib. 571); Austria and Russia, 1785 (id. iv. 78); England and France, 1786 (ib. 172); France and Russia, 1787 (ib. 212); Russia and Two Sicilies, 1787 (ib. 238); Russia and Portugal, 1787 (ib. 329); United States and France, 1800 (id. vii.



during the American Civil War. It can scarcely be believed however that its vitality could stand the rude test of a serious maritime war. Dana observes with great truth that 'as the captor must still take the cargo into port, and submit it to adjudication, and as the neutral carrier cannot bind the owner of the supposed contraband not to claim it in court, the captor is entitled for his own protection to the usual evidence of the ship's papers and whatever other evidence induced him to make the capture, as well as to the examination on oath of the master and supercargo of the vessel. It may not be possible or convenient to detach all the papers and deliver them to the captor ; and certainly the testimony of the persons on board cannot be taken at sea in the manner required by law.' In face of these difficulties he is inclined to think that even the treaties can only apply to cases in which 'there is a capacity in the neutral vessel to insure the captor against a claim to the goods <sup>1</sup>.'

The more common practice is to take the vessel with its cargo into a port of the captor, where the articles of contraband are duly condemned ; but the vessel itself is ordinarily visited with no further penalty than loss of time, freight, and expenses<sup>2</sup>. If however the ship and the cargo belong to the same owners, or if the owner of the former is privy to the carriage of the contraband goods, the vessel is involved

104) ; Russia and Sweden, 1801 (ib. 332) ; United States and Central America, 1825 (Nouv. Rec. vi. 834) ; United States and Brazil, 1828 (id. ix. 61) ; United States and Mexico, 1831 (id. x. 339) ; United States and Venezuela, 1836 (id. xiii. 558) ; United States and Peru, 1836 (id. xv. 119) ; United States and Ecuador, 1839 (Nouv. Rec. Gén. iv. 315) ; France and Ecuador, 1843 (id. v. 172) ; France and New Grenada, 1844 (id. vii. 620) ; France and Guatemala, 1848 (id. xii. 11) ; United States and New Grenada, 1848 (id. xiii. 653) ; United States and San Salvador, 1850 (id. xv. 74). Russia seems no longer to hold the views of which she was an apostle in the end of the last century ; see p. 557, note 1.

<sup>1</sup> Dana's Wheaton, note No. 230. Bluntschli (§ 810), Calvo (§ 1122), and Hautefeuille (tit. xiii. chap. i. sect. i. § i) elevate the practice into a neutral right. Ortolan (Dip. de la Mer, ii. 203) is more cautious.

<sup>2</sup> Wheaton, Elem. pt. iv. chap. iii. § 26 ; Phillimore, iii. § cclxxv ; The Sarah Christina, 1 Rob. 242 ; Heffter, § 161.



PART IV. in their fate<sup>1</sup>. Ships have also been condemned for having  
 CHAP. V. on board articles contraband under a treaty to which their  
 country was a party; and for the fraudulent circumstances  
 of false papers and false destination<sup>2</sup>.

On inno-  
cent goods  
in the  
same  
vessel.

The principle which, according to the English practice, governs the treatment of innocent merchandise found on board a ship engaged in the transport of contraband, is identical with that which affects the vessel itself. 'The law of nations,' said Lord Stowell, 'in my opinion is, that to escape the contagion of contraband, the innocent articles must be the property of a different owner<sup>3</sup>.'

Within  
what time  
the penalty  
attaches.

It is universally admitted that the offence of transporting contraband goods is complete, and that the penalty of confiscation attaches, from the moment of quitting port on a belligerent destination. On the other hand, as a consequence of the doctrine that the goods are seized because of their noxious qualities, and not because of the act of the person carrying them, it is held that so soon as the forbidden merchandise is deposited, the liability which is its outgrowth is deposited also, and that neither the proceeds of its sales can be touched on the return voyage, nor can the vessel, although previously

<sup>1</sup> Wheaton, Phillimore, and Heffter, loc. cit.; Bluntschli, § 810. Ortolan (Dip. de la Mer, ii 199) argues that it is immaterial whether the vessel and the cargo belong to the same person or not. In the usual theory, 'le fond de la pensée serait toujours de traiter le commerçant en ennemi, de dire: Nous tenons tes biens, quels qu'ils soient, nous les gardons. Mais nous le répétons, il n'est pas ennemi, il est commerçant; il ne s'agit pas d'actes d'un gouvernement qui romprait la neutralité, mais d'actes de particuliers qui exercent leur trafic.' It seems to me that M. Ortolan's reasoning is sound; but it may be doubted if the current practice is likely at present to be disturbed.

<sup>2</sup> The Neutralitet, iii Rob. 296; The Franklin, iii Rob. 224; The Springbok, v Wallace, 1. The decision in this case was no doubt wrong; but the error consisted in a misapprehension of facts, not in a misstatement of the general principle of law.

Ortolan argues (Dip. de la Mer, ii. 200-2), but not convincingly, against condemnation for fraud. He sums up his views by saying, 'Dans notre opinion la confiscation pour contrebande de guerre ne peut s'appliquer qu'aux articles prohibés et jamais au navire innocent ni à la cargaison innocente.'

<sup>3</sup> The Stadt Embden, i Rob. 31.

affected by her contents, be brought in for adjudication<sup>1</sup>. PART IV.  
 Some cases have however been decided in the English courts CHAP. V.  
 in which, a contraband cargo having been taken to the  
 East Indies, with fraudulent papers and a fraudulent destination, the return cargo was condemned on the ground that 'in distant voyages the different parts are not to be considered as two voyages, but as one entire transaction, formed upon one original plan, conducted by the same persons, and under one set of instructions, *ab ovo usque ad mala*.' And it was even held that 'it is by no means necessary that the cargo should have been purchased by the proceeds of the contraband' carried in the outward voyage<sup>2</sup>. The doctrine of these cases is not approved of by Wheaton or by foreign publicists; and, while undoubtedly severe, it does not appear to be a necessary deduction from the general principles governing the forfeiture of contraband cargoes.

<sup>1</sup> *The Imina*, iii Rob. 168; Wheaton, Elem. pt. iv. chap. iii. § 26; Calvo, § 1116; Heffter, § 161.

<sup>2</sup> *The Nancy*, iii Rob. 126; *The Margaret*, i Acton, 335.

## CHAPTER VI.

### ANALOGUES OF CONTRABAND.

PART IV.  
CHAP. VI.

—  
In what  
the car-  
riage of  
analogues  
of contra-  
band differs  
from that  
of contra-  
band.

§ 248. WITH the transport of contraband merchandise is usually classed analogically that of despatches bearing on the conduct of the war, and of persons in the service of a belligerent. It is however more correct and not less convenient to place adventures of this kind under a distinct head, the analogy which they possess to the carriage of articles contraband of war being always remote. They differ from it in some cases by involving an intimacy of connection with the belligerent which cannot be inferred from the mere transport of contraband of war, and in others by implying a purely accidental and almost involuntary association with him. They are invariably something distinctly more or something distinctly less than the transport of contraband amounts to. When they are of the former character they may be undertaken for profit alone, but they are not in the way of mere trade. The neutral individual is not only taking his goods for sale to the best market, irrespectively of the effect which their sale to a particular customer may have on the issue of the war, but he makes a specific bargain to carry despatches or persons in the service of the belligerent for belligerent purposes; he thus personally enters the service of the belligerent, he contracts as a servant to perform acts intended to affect the issue of the war, and he makes himself in effect the enemy of the other belligerent. In doing so he does not compromise the neutrality of his own sovereign, because the

non-neutral acts are either as a matter of fact done beyond the territorial jurisdiction of the latter, or if initiated within it, as sometimes is the case in carrying despatches, they are of too secret a nature to be, as a general rule, known or prevented. Hence the belligerent is allowed to protect himself by means analogous to those which he uses in the suppression of contraband trade. He stops the trade by force, and inflicts a penalty on the neutral individual. The real analogy between carriage of contraband and acts of the kind in question lies not in the nature of the acts, but in the nature of the remedy applicable in respect of them.

When the acts done are of the second kind, the belligerent has no right to look upon them as being otherwise than innocent in intention. If a neutral, who has been in the habit in the way of his ordinary business of carrying postbags to or from a belligerent port, receives sealed despatches with other letters in the usual bags, or if he even receives a separate bundle of despatches without special remuneration, he cannot be said to make a bargain with the belligerent, or to enter his service personally, for belligerent purposes. He cannot even be said to have done an act of trade of which he knows that the effect will be injurious to the other belligerent; despatches may be noxious, but they may also be innoxious; and the mere handing over of despatches to him in the ordinary course of business affords him no means of judging of their quality. A neutral accepting despatches in this manner cannot therefore be subjected to a penalty. Whether those which he takes under his care are exposed to seizure will be considered presently. When again a neutral in the way of his ordinary business holds himself out as a common carrier, willing to transport everybody who may come to him for a certain sum of money from one specified place to another, he cannot be supposed to identify himself specially with belligerent persons in the service of the state who take passage with him. The only questions to be considered are whether there is any usage compelling him to

PART IV. number, importance, or distinction, and at the same time  
CHAP. VI. the circumstances of their reception are such, as to create a reasonable presumption that the owner or his agent intend to aid the belligerent in his war. In the case of the ship *Friendship*, a vessel was hired to bring home to France eighty-four shipwrecked officers and sailors. It was confiscated as a transport, because it appeared in evidence that the vessel was not permitted to take cargo, and that the French government had paid for the passage of the men; who were thus being carried, not as common passengers, but as a part of the French navy, from a port of the United States to a port in France. In another case a vessel sailed from Rotterdam to Lisbon, where it was ostensibly chartered by a Portuguese subject to carry cargo or passengers to Macao; no cargo was shipped, but after some time spent in fitting it for passengers with unusual care, three Dutch officers of rank embarked in it, not for Macao, but for Batavia. Lord Stowell, on the facts of the case, inferred that a contract had been entered into with the Dutch government before the vessel left Rotterdam, and condemned it<sup>1</sup>.

In the transport of persons in the service of a belligerent, the essence of the offence consists in the intent to help him; if therefore this intent can in any way be proved, it is not only immaterial whether the service rendered is important or slight, but it is not even necessary that it shall have an immediate local relation to warlike operations. It is possible for a neutral carrier to become affected by responsibility for a transport effected to a neutral port, and it may perhaps be enough to establish liability that the persons so conveyed shall be in civil employment.

As a neutral vessel may be the bearer of despatches passing between a belligerent government and its diplomatic agents in a neutral country, so also, and for the same reasons, the transport of diplomatic agents themselves is permitted.

<sup>1</sup> *The Friendship*, vi Rob. 422; *The Orozembo*, ib. 433; *Bernard*, 224; *Ortolan*, *Dip. de la Mer*, ii. 234.

§ 251. It will be remembered that in the case of ordinary PART IV. contraband trade the contraband merchandise is confiscated, CHAP. VI. but the vessel usually suffers no further penalty than loss of Penalty in- time, freights, and expenses. In the case of transport of curring by despatches or belligerent persons, the despatches are of course the trans- seized, the persons become prisoners of war, and the ship is port of confiscated. The different treatment of the ship in the two analogues cases corresponds to the different character of the acts of its of contra- owner. For simple carriage of contraband, the carrier lies band. under no presumption of enmity towards the belligerent, and his loss of freight &c. is a sensible deterrent from the forbidden traffic; when he enters the service of the enemy, seizure of the transported objects is not likely to affect his earnings, while at the same time he has so acted as fully to justify the employment towards him of greater severity <sup>1</sup>.

§ 252. Vessels not being subject to a penalty for carrying Carriage of despatches in the way of ordinary business, packets of a despatches regular mail line are exempted as of course; and merchant in the or- vessels are protected in like manner when, by municipal dinary way regulations of the country from the ports of which they have of trade. sailed, they are obliged to take on board all government despatches or letters sent from the post-offices <sup>2</sup>.

The great increase which has taken place of late years in Whether the number of steamers plying regularly with mails has given mail-bags importance to the question whether it is possible to invest ought to them with further privileges. At present, although secure be exempt from condemnation, they are no more exempted than any from other private ship from visit; nor does their own innocence search. protect their noxious contents, so that their post-bags may be seized on account of despatches believed to be within them. But the secrecy and regularity of postal communication is now so necessary to the intercourse of nations, and the

<sup>1</sup> Ortolan, *Dip. de la Mer*, ii. 234; Wheaton, *Elem.* pt. iv. ch. iii. § 25; Phillimore, iii. § cclxxii; Heffter, § 161<sup>a</sup>.

<sup>2</sup> Lawrence, note to Wheaton, pt. iv. chap. iii. § 25; Calvo, § 1132; Ortolan, ii. 240. Hautefeuille exaggerates the immunities of neutrals carrying despatches; tit. viii. sect. v. § 5.

PART IV. interests affected by every detention of a mail are so great,  
 CHAP. VI. that the practical enforcement of the belligerent right would soon become intolerable to neutrals. Much tenderness would no doubt now be shown in a naval war to mail vessels and their contents; and it may be assumed that the latter would only be seized under very exceptional circumstances. France in 1870 directed its officers that 'when a vessel subjected to visit is a packet-boat engaged in postal service, and with a government agent on board belonging to the state of which the vessel carries the flag, the word of the agent may be taken as to the character of the letters and despatches on board<sup>1</sup>;' and it is likely that the line of conduct followed on this occasion will serve as a model to other belligerents. At the same time it is impossible to overlook the fact that no national guarantee of the innocence of the contents of a mail can really be afforded by a neutral power. No government could undertake to answer for all letters passed in the ordinary manner through its post-offices. To give immunity from seizure as of right to neutral mail-bags would therefore be equivalent to resigning all power to intercept correspondence between the hostile country and its colonies, or a distant expedition sent out by it; and it is not difficult to imagine occasions when the absence of such power might be a matter of grave importance.

No usage has hitherto formed itself on the subject. During the American Civil War it was at first ordered by the government of the United States that duly authenticated

<sup>1</sup> Rev. de Droit Int. xi. 582. A treaty between England and Brazil of the year 1827 provides that packets are to be considered king's ships until a special convention on the subject is concluded. De Martens, *Nouv. Rec.* vii. 486. In a series of postal conventions between England and France it has been agreed, first, that packets owned by the state should be treated as vessels of war in the ports of the two countries; next, that vessels freighted as packets by the governments of the respective states should be so treated; and, finally, that lines subsidised by them should have the same privileges. De Martens, *Nouv. Rec.* xiii. 107; *Nouv. Rec. Gén.* v. 183; Hertalet's *Treaties*, x. 108. The conventions between England and France, it will be observed, do not provide for the treatment of packets on the high seas.

mail-bags should either be forwarded unopened to the foreign department at Washington, or should be handed after seizure to a naval or consular authority of the country to which they belonged, to be opened by him, on the understanding that documents to which the belligerent government had a right should be delivered to it. On the suggestion of the English government, which expressed its belief 'that the government of the United States was prepared to concede that all mail-bags, clearly certified to be such, should be exempt from seizure or visitation,' these orders were modified; and naval officers were directed, in the case of the capture of vessels carrying mails, to forward the latter unopened to their destination<sup>1</sup>.

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CHAP. VI.

§ 253. The effect of the carriage of persons in the service of a belligerent by a neutral vessel in the ordinary way of trade depends upon the answer which has to be given to the question whether such persons can be assimilated to contraband of war. If they can be classed as a sort of contraband, they may be seized and brought in with the vessel on board of which they are found, and proof that they have been received with knowledge of their character will entail the same consequences to the ship as follow upon ordinary contraband trade. If they cannot be so classed, the vessel in which they are travelling remains a ship under neutral jurisdiction which has not been brought by the conduct of the persons having control over it within the scope of those exceptional rights in restraint of noxious trade which belligerents have been allowed to assume; the enemy of the belligerent travellers therefore is thrown back upon those ordinary rights which he possesses in time of peace; in other words, he can only seize the persons in question in the emergency of an immediate and pressing danger<sup>2</sup>.

Carriage  
of persons  
in the or-  
dinary way  
of trade.

The point came under discussion between England and the Case of the Trent.

<sup>1</sup> See the correspondence in Bernard's Neut. of Great Britain, 319-23; Dana, note to Wheaton, No. 228.

<sup>2</sup> Comp. § 86.



PART IV. United States during the American Civil War. In 1861  
CHAP. VI. Messrs. Mason and Slidell, who had been appointed diplomatic agents of the Confederate States at the Courts of St. James' and the Tuileries, came on board the English passenger steamer Trent at the Havana, and sailed in her from there to St. Thomas' on their way to England. While passing through the Bahama Channel the vessel was boarded from the American frigate San Jacinto, and Messrs. Mason and Slidell were taken out of her and carried as prisoners to Boston, the Trent being allowed to continue her voyage. The English government demanded and obtained their immediate release, it being acknowledged by the United States that they had been unduly arrested. Lord Russell and Mr. Seward differed however in the view which they respectively took as to the reasons for which the capture was irregular.

Captain Wilkes, the commander of the San Jacinto, professed to regard Messrs. Mason and Slidell as embodied despatches. In the same spirit Mr. Seward, in an elaborate note addressed to Lord Lyons, declared them to be contraband, 'since the word means broadly, contrary to proclamation, prohibited, illegal, unlawful. All writers and judges,' he adds in an off-hand way, but without giving any proof of his assertion<sup>1</sup>, 'pronounce naval or military persons in the service of the enemy contraband.' Mr. Seward then claimed that Messrs. Mason and Slidell were liable to capture. But he admitted that they were not properly disposed of. If they were contraband of war, they and the vessel ought to have been sent in together for adjudication; a captor has no right to decide for himself whether particular things or persons are in fact contraband; to do so is the business of the courts, and a neutral state cannot be expected to acquiesce in the rough conclusions of a naval officer arrived at on the deck of the prize vessel. At this point Mr. Seward found himself confronted with an insuperable difficulty which he tried in vain

<sup>1</sup> He refers to Vattel and Lord Stowell, but the passages which he paraphrases have no reference whatever to the point in question.

to get over. If the captured persons had been really contraband, the courts would have had no difficulty in dealing with them whether the vessel were brought in or not. 'But Courts of Admiralty have formulas to try only claims to contraband chattels, but none to try claims concerning contraband persons; the courts can entertain no proceedings and render no judgment in favour of or against the alleged contraband men.' The presence of the vessel was necessary in order to place before the courts indirectly the question whether the men were contraband or not; and if that question, so raised, were settled adversely to the men, Mr. Seward acknowledged that the courts were incompetent to determine in what way they should be disposed of; that matter, he confessed, was 'still to be really determined, if at all, by diplomatic arrangement or by war.' Mr. Seward's own statement is conclusive against himself. The whole law of contraband, blockade, &c. is based upon the concession by the neutral state to the belligerent state and its courts of whatever jurisdiction is necessary for self-protection. To say that Admiralty Courts have no means of rendering a judgment in favour of or against persons alleged to be contraband, or of determining what disposition is to be made of them, is to say that persons have not been treated as contraband. If they are contraband the courts must have power to deal with them.

Lord Russell controverted the doctrine of Mr. Seward in a note which was also elaborate. He denied that the capture of Messrs. Mason and Slidell was simply irregular in its incidents, and maintained that they were not liable to capture at all; but he rested the immunity which he claimed for them on the privilege of receiving diplomatic agents from belligerent states accorded by the practice of nations to neutral states, and on the necessity that contraband articles shall have a hostile, and not a neutral, destination; he even seems, by quoting without comment a passage from Bynkershoek, in which soldiers are classed with arms and other articles of use in war, to favour the view that at least persons who are in

PART IV. the military service of the state may be treated as contraband<sup>1</sup>.  
 CHAP. VI.

It is to be regretted that Lord Russell did not address himself to the refutation of the doctrine that persons can be contraband of war. For the reasons mentioned above, however, there need be no hesitation in rejecting it. In the words of Mr. Bernard, 'it is incorrect to speak of the conveyance of persons in the military or civil employment of a belligerent as if it were the same thing as the conveyance of contraband of war, or as if the same rules were applicable to it. It is a different thing, and the rules applicable to it are different.' If a vessel is so hired by a belligerent that he has entire control over it to the extent of his special needs, the ship itself is confiscable as having acquired an enemy character, and the persons on board become prisoners of war. If on the other hand belligerent persons, whatever their quality, go on board a neutral vessel as simple passengers to the place whither she is in any case bound, the ship remains neutral and covers the persons on board with the protection of her neutral character<sup>2</sup>.

<sup>1</sup> Bynkershoek, *Quæst. Jur. Pub. lib. i. cap. ix*; but Bynkershoek is speaking rather of a general state duty to prevent its subjects from helping a belligerent than of the special question of contraband. In the next chapter, where he discusses what articles are contraband of war, he makes no mention of soldiers.

<sup>2</sup> Mr. Seward to Lord Lyons, Dec. 26, 1862, and Earl Russell to Lord Lyons, Jan. 23, 1862, ap. Bernard, 201 and 215. On the general doctrine see Bernard, 224; Bluntschli, § 817; Dana, note to Wheaton's *Elem.*, No. 228; Marquardsen, *Der Trentfall*. The last-mentioned work may be consulted with advantage on the whole subject of the transport by neutrals of belligerent persons and despatches.

## CHAPTER VII.

### CARRIAGE OF BELLIGERENT GOODS IN NEUTRAL VESSELS.

§ 254. No branch of international law has been debated at PART IV.  
such length or with greater keenness than those which refer CHAP. VII.  
to belligerent goods carried in neutral vessels, and to neutral Conflicting  
goods in belligerent vessels. It is possible, and indeed pro- theories  
bable, that the Declaration of Paris, to which most civilised on the  
states have adhered, has permanently secured an identical subject.  
practice among the signatories to it, and that it will in time  
be definitively accepted by those states also which for the  
present have reserved the right to pursue their accustomed  
policy. But the terms of the Declaration are not strictly  
authoritative law, and it is therefore not yet superfluous to  
sketch, though more lightly than was formerly necessary, the  
history and the grounds of the rival doctrines which have  
been held upon the two subjects. Usually these subjects have  
been treated together, and the verbal jingle, 'Free ships,  
free goods; Enemy ships, enemy goods,' has been thought to  
express a necessary correlation, which has been equally sup-  
posed to exist between the contrary doctrines. The Declara-  
tion of Paris, in choosing from each system the part most  
favourable to neutrals, has at least restored their natural inde-  
pendence to two essentially distinct questions of law.

Two theories have been held, and two usages have existed,  
with respect to the treatment of belligerent goods in neutral  
vessels. In the simpler and primitive view they were

PART IV. enemy's goods, and therefore liable to seizure, wherever  
 CHAP. VII. found outside the jurisdiction of a third state; according  
 — to a later and more artificial doctrine, the neutral vessel is  
 invested with power to protect them.

Early  
 usage.

Practice  
 in the  
 seven-  
 teenth  
 century.

§ 255. The first of these doctrines is found in the *Consolato del Mare*, the rules of which embodied the customs authoritative in the western Mediterranean during the Middle Ages; and Louis XI, in writing to the King of Sicily, speaks of the principle as being in his time accepted beyond all question<sup>1</sup>. The French Ordonnances of 1538, 1543, and 1584, not only confiscated the hostile goods, but extended the penalty to the ship in which they were embarked, and though the courts appear to have avoided giving full effect to the law, their actual rules were not milder than those enforced by other nations<sup>2</sup>. It was not till 1650 that the principle of the immunity of goods carried in a neutral vessel was asserted or agreed upon. In that year a treaty was concluded between Spain and the United Provinces, in which it was agreed that the goods of the enemies of either party should be free from capture, when on board the ships of the other party, the latter being neutral: and in 1655 a treaty was made between France and the Hanse Towns, the language of which seems to convey the privilege<sup>3</sup>, but its real meaning, as understood by one of the contracting parties, may probably be best read by the light of negotiations which took place some time before between France and the United Provinces. In 1646 a treaty had provided that for four years the Dutch government should be excepted from the

<sup>1</sup> He says that it is a 'usus in hoc occidentali mari indelebiter observatus, res hostium et bona, etiamsi infra amicorum aut confoederatorum triremes seu naves positae sint, nisi obstiterit securitas specialiter super hoc concessa, impune et licite jure bellorum capi posse;' quoted by Heffter, § 163.

<sup>2</sup> Valin, *Ord. de la Marine*, liv. iii. tit. ix. art. 7. Grotius gave his sanction to the principle of the French Ordonnances: 'Neque amicorum naves in praedam veniunt ob res hostiles, nisi ex consensu id factum sit dominorum navia,' which of course would usually be the case. *De Jure Belli et Pacis*, lib. iii. c. vi. § vi. note.

<sup>3</sup> Dumont, vi. i. 571, and ii. 103.

operation of the Ordinances, and that 'their ships should free their cargo, notwithstanding the presence in it of merchandise, and even of grain and vegetables belonging to enemies, excepting always articles contraband of war.' On an attempt being made by De Witt in 1653 to take the plain meaning of these words as the ground of a permanent arrangement, it appeared that the French had merely understood the treaty of 1646 to preserve from confiscation the ship and neutral merchandise associated in its cargo with that of an enemy. It is not likely, as is remarked by Manning, that Louis XIV would grant larger immunities to the Hanse Towns than to Holland, and the treaty made with them in 1655 may therefore be no doubt interpreted in the same sense<sup>1</sup>. In 1659 a clause appears in the Peace of the Pyrenees, by which free ships are made to free goods, and during the remainder of the seventeenth century France concluded nine treaties, in which a like provision was contained<sup>2</sup>. But in the midst of these treaties the Ordonnance of 1681 proved how entirely they were exceptions to the general policy of the state, by re-enacting in all their severity the provisions of the law of 1584, and in 1661 and 1663 treaties were concluded with Sweden in which no stipulation inconsistent with it was contained<sup>3</sup>.

The true promoters of the new principle were the Dutch, to whom the security of their carrying trade was of the deepest importance. They not only were the earliest people to stipulate for the freedom of enemy's cargo in neutral ships by a treaty of undoubted meaning, but they steadily kept it before their eyes as an object to be striven for, to such purpose that they induced Spain, Portugal, France, England,

The Dutch  
the pro-  
moters of  
the doc-  
trine, Free  
ships, free  
goods.

<sup>1</sup> Dumont, vi. i. 342; Manning, 317.

<sup>2</sup> With Denmark, 1662 (Dumont, vi. ii. 439); Denmark, 1663 (ib. 463); United Provinces, 1662 (ib. 415); Portugal, 1667 (id. vii. i. 17); Spain, 1668 (ib. 90); Sweden, 1672 (ib. 166); England, 1677 (ib. 329); United Provinces, 1678 (ib. 359); United Provinces, 1697 (ib. ii. 389).

<sup>3</sup> Valin, Ord. de la Marine, liv. iii. tit. ix. art. 7. Treaties with Sweden; Dumont, vi. ii. 381 and 448.

PART IV. and Sweden to grant or confirm the privilege in twelve  
 CHAP. VII. treaties between the years 1650 and 1700<sup>1</sup>. The only treaty  
 of the century to which neither the United Provinces nor  
 France was a party was concluded between England and  
 Portugal<sup>2</sup>, but except when prevented by express convention,  
 England maintained the confiscation of enemy's goods, and  
 she confirmed her practice by several treaties<sup>3</sup>. At least ten  
 treaties, dealing with the commercial relations of the con-  
 tracting parties, the greater number of which were made  
 between nations which were also parties to treaties giving  
 expression to the doctrine of Free ships, free goods, permitted  
 by their silence the common practice to continue, and mani-  
 fested the absence of a fixed policy on the part of the  
 countries which engaged in them<sup>4</sup>.

Practice  
 in the  
 eighteenth  
 century.

France.

At the commencement of the eighteenth century, there-  
 fore, the new principle had made little solid progress; and  
 one of the two nations which had concluded the largest  
 number of treaties embracing it, was in no hurry to adopt  
 it as a voluntary rule. The French *Règlement* of 1704  
 exaggerated the harshness of former law by rendering liable  
 to confiscation the raw or manufactured produce of hostile  
 soil, when the property of a neutral, except when it was in

<sup>1</sup> With Spain, 1650 (Dumont, vi. i. 571); Portugal, 1661 (ib. ii. 369); France, 1661 (ib. 346); France, 1662 (ib. 415); England, 1667 (ib. vii. i. 49); Sweden, 1667 (ib. 38); England, 1674 (ib. 283); Sweden, 1675 (ib. 317); France, 1678 (ib. 359); Sweden, 1679 (ib. 440); England, 1689 (ib. ii. 236); France, 1697 (ib. 389).

<sup>2</sup> England and Portugal, 1652 (Dumont, vi. ii. 84). This treaty was confirmed in 1661 and 1703, so that the rule of Free ships, free goods remained in force as between England and Portugal till 1810, when it was abandoned by the Treaty of Rio Janeiro. Hansard, cxlii. 491.

<sup>3</sup> With Sweden, 1654 (Dumont, vi. ii. 80); Denmark, 1654 (ib. 92); Sweden, 1661 (ib. 387); Denmark, 1661 (ib. 346); Denmark, 1670 (ib. vii. i. 128).

<sup>4</sup> England and the United Provinces, 1654 (Dumont, vi. ii. 76); England and Brandenburg, 1661 (ib. 364); England and Sweden, 1661 (ib. 384); England and Denmark, 1661 (ib. 346); Sweden and France, 1661 (ib. 381); England and the United Provinces, 1662 (ib. 423); England and Denmark, 1669 (vii. i. 126); England and Spain, 1670 (ib. 138); England and Sweden, 1666 (vi. iii. 83); France and Sweden, 1672 (vii. i. 169).

course of transport direct from the enemy's country to a port of the neutral state to which its owner belonged. It was not till 1744 that neutral vessels carrying enemy's goods were freed from confiscation, and it was only in 1778 that the freedom of the goods themselves was conceded by the Règlement of that year<sup>1</sup>. It must be presumed that the rules enforced by a country, apart from treaties, correspond to its views of justice or established usage. If, while maintaining these rules, it at the same time multiplies treaties in an opposite sense, the inference is not that it looks upon the law which it is content to administer as destitute of authority, but that its own interests are best served by inducing other nations to alter its provisions. France became the advocate of the principle of Free ships, free goods, but it is safer to appeal to her regulations than to her treaties as evidence of general rule, and it is not likely that those regulations would have been expunged from her international code if the maritime predominance of England had failed to consolidate itself. Spain imitated the policy of France, and while recognising the freedom of enemy's goods by treaty, it was not till 1780 that her private rules exempted either them or the neutral vessel from confiscation<sup>2</sup>. England fettered herself by treaties with few states, and continued to give effect to the old practice of seizing neutral goods, while releasing the neutral vessel with payment of freight<sup>3</sup>. In maintaining

PART IV.  
CHAP. VII.

Spain.

Great  
Britain.

<sup>1</sup> Valin, *Ord. de la Marine*, liv. iii. tit. ix. art. 7; Pistoye et Duverdy, i. 344 and 360.

<sup>2</sup> De Martens, *Rec.* iv. 270.

<sup>3</sup> The principal treaties concluded during the eighteenth century, down to the time of the First Armed Neutrality, in which the principle of Free ships, free goods was contained, were those of Utrecht in 1713 between England, France, and the United Provinces (Dumont, viii. i. 348 and 379); between England and Spain, 1713 (*ib.* 409); Spain and the United Provinces, 1714 (*ib.* 431); the United Provinces and Russia, 1715 (*ib.* 470); Spain and the Empire, 1725 (*ib.* ii. 115); France and the United Provinces, 1739 (Wenck. *Codex Juris Gentium*, i. 424); France and Denmark, 1742 (*ib.* 621); Sweden and the Two Sicilies, 1742 (*ib.* ii. 143); Denmark and the Two Sicilies, 1748 (*ib.* 281); France and the United States, 1778 (De Martens, *Rec.* ii. 598).



PART IV. this usage she was brought in 1780 into sharp collision with  
 CHAP. VII. the neutral states. The First Armed Neutrality put forward  
 First the immunity of belligerent cargoes in neutral vessels as one  
 Armed of its doctrines; and the weakness produced by the American  
 Neutrality. war prevented England from adopting any means for the  
 vindication of her views. But the members of the league  
 were not themselves proof against the temptation of war.  
 In 1788 Sweden openly renounced the principles of the  
 Armed Neutrality while at war with Russia, and the latter  
 power tacitly followed her example<sup>1</sup>. The treaties which  
 were made between the establishment of the armed neutrality  
 and the outbreak of the wars of the Revolution stipulate for  
 the freedom of hostile goods<sup>2</sup>; but three months of hostilities  
 had hardly passed, in 1793, when France declared enemy's  
 goods on board neutral vessels to be good prize, the neutral  
 ship being released, and freight being paid by the captors<sup>3</sup>.  
 Russia had already denounced her treaty of 1787; and Great  
 Britain, Russia, Spain, the Empire, and Prussia agreed that  
 the contracting powers would unite all their efforts to prevent  
 neutrals 'from giving, on this occasion of common concern  
 to every civilised state, any protection whatever, directly or  
 indirectly, in consequence of their neutrality, to the com-  
 merce or property of the French, on the sea, or in the ports  
 of France<sup>4</sup>.' The general attitude of England in the matter

Practice  
 during the  
 French  
 wars,  
 1793-  
 1815.

<sup>1</sup> Manning, 336.

<sup>2</sup> United States and United Provinces, 1782 (De Martens, Rec. iii. 439); Denmark and Russia, 1782 (ib. 476); England, France, and Spain, 1783 (ib. 543); United States and Sweden, 1783 (ib. 568); United States and Prussia, 1785 (ib. iv. 42); France and the United Provinces, 1785 (ib. 68); Austria and Russia, 1785 (ib. 76); England and France, 1786 (ib. 168); Russia and France, 1787 (ib. 210); Russia and the Two Sicilies, 1787 (ib. 236); Russia and Portugal, 1787 (ib. 327); France and Hamburg, 1789 (ib. 426); Denmark and Genoa, 1789 (ib. 442). But the United States distinctly asserted the doctrine that 'according to the law of nations, the goods of an enemy found on board the ship of a friend are liable to capture.' Messrs. Pinckney, &c. to the French Minister of Foreign Affairs, Jan. 27, 1798, American State Papers, ii. 181. See also, Mr. Jefferson to Mr. Morris, Aug. 16, 1793, ib. i. 123.

<sup>3</sup> De Martens, Rec. v. 382.

<sup>4</sup> De Martens, Rec. v. 409 and 440.

was clearly defined by Pitt. 'I must observe,' he said, 'that the hon. gentleman has fallen into the same error which constitutes the great fallacy in the reasoning of the advocates for the Northern powers; namely, that every exception from the general law by a particular treaty proves the law to be as it is stated in that treaty; whereas the very circumstance of making an exception by treaty proves what the general law of nations would be if no such treaty were made to modify or alter it. The hon. gentleman alludes to the treaty made between this country and France in the year 1787, known by the name of the Commercial Treaty. In that treaty it certainly was stipulated that in the event of Great Britain being engaged in war and France being neutral, she should have the advantage now claimed, and *vice versa*; but the hon. gentleman confesses that he recollects that the very same objection was made at that time, and was fully answered, and that it was clearly proved that no part of our stipulation in that treaty tended to a dereliction of the principles for which we are now contending<sup>1</sup>.'

The Second Armed Neutrality reasserted for a moment the principles of 1780, but one of the articles of the treaty concluded between England and Russia in 1801, to which Denmark and Sweden afterwards acceded, provided that the property of enemies on board neutral vessels should be confiscable. In 1807 Russia annulled the convention of 1801, and proclaiming afresh the principles of the Armed Neutrality, declared that she would never depart from them<sup>2</sup>; but in 1809 an ukase was issued under which 'ships laden in part with the goods of the manufacture or produce of hostile countries were to be stopped, and the merchandise confiscated and sold by auction for the profit of the crown. But if the merchandise aforesaid compose more than half the cargo, not only the cargo, but the ship also shall be confiscated<sup>3</sup>.'

<sup>1</sup> Pitt's Speeches, iii. 227-8.

<sup>2</sup> Ortolan, Dip. de la Mer, ii. 156.

<sup>3</sup> De Martens, Nouv. Rec. i. 485.

PART IV. Thus at the general peace, not only had the ancient practice been steadily acted upon by the most powerful maritime state; but the advocates of the intrusive principle had permitted their allegiance to it to be not infrequently shaken, under circumstances which sufficiently prove their conduct to have been simply dictated in all cases by the varying interests of the moment.

Progress  
of the doctrine,  
Free ships, free  
goods  
towards  
general  
acceptance.

§ 256. Between 1815 and 1854 France gave proof of her continued preference for the doctrine of Free ships, free goods, by concluding several treaties in which it was embodied; and the United States, while fully accepting the English view as expressing existing law, entered into frequent engagements in a contrary sense<sup>1</sup>. The new principle, therefore, acquired a certain amount of additional strength; and at the same time no opportunities occurred for upholding the older usage by practice. Until the beginning of the Crimean War, however, no change took place in the relative legal value of the two principles. The original adherents of the newer doctrine had embraced it afresh; but it had not been admitted by the powers which before rejected it. But

<sup>1</sup> 'The United States and Great Britain have long stood committed to the following points as in their opinion established in the law of nations:—1. That a belligerent may take enemy's goods from neutral custody on the high seas; 2. That the carrying of enemy's goods by a neutral is no offence, and consequently not only does not involve the neutral vessel in penalty, but entitles it to its freight from the captors as a condition to a right to interfere with it on the high seas. While the government of the United States has endeavoured to introduce the rule of Free ships, free goods, by conventions, her courts have always decided that it is not the rule of war; and her diplomatists and text-writers, with singular concurrence, considering the opposite diplomatic policy of the country, have agreed to that position.' Dana's Wheaton, note to § 475.

The treaties concluded by the United States are those with Sweden, 1827 (*De Martens, Nouv. Rec. vii. 279*); Colombia, 1824 (*id. vi. 992*); Central America, 1825 (*ib. 832*); Brazil, 1828 (*id. ix. 60*); Mexico, 1831 (*id. x. 336*); Chile, 1832 (*id. xi. 442*); Venezuela, 1836 (*Nouv. Rec., xiii. 556*); Peru-Bolivia, 1836 (*id. xv. 118*); Ecuador, 1839 (*Nouv. Rec. Gén. iv. 310*); New Grenada, 1846 (*id. xiii. 659*); San Salvador, 1850 (*id. xv. 73*); Russia, 1854 (*id. xvi. i. 572*). Treaties have been concluded by France with Venezuela, 1843 (*id. v. 170*); Ecuador, 1843 (*ib. 409*); New Grenada, 1844 (*id. vii. 620*); Chile, 1846 (*id. xvi. i. 9*); Guatemala, 1848 (*id. xii. 10*).

in 1854 it was felt that it was difficult for allied states to apply different legal theories in a common war, and an agreement for identical action was come to by Great Britain and France, under which the principle of the immunity of enemy's goods in neutral ships was provisionally accepted by the former. On the conclusion of the Treaty of Paris the same principle was accepted by the parties to it in a Declaration, which was intended to form the basis of a uniform doctrine on maritime law, and to which all states not represented at the Congress were afterwards invited to accede<sup>1</sup>. The only countries which, up to the present time, have withheld their formal adherence to the Declaration are the United States, Spain, Mexico, and Uruguay. But the United States announced at the beginning of the Civil War that they would give effect to the principle during the continuance of hostilities<sup>2</sup>.

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It is acted upon during the Crimean War.

Declaration of Paris.

Although, therefore, the freedom of enemy's goods in neutral vessels is not yet secured by an unanimous act, or by a usage which is in strictness binding on all nations, there is little probability of reversion to the custom which was at one time universal, and which till lately enjoyed a superior authority.

<sup>1</sup> See Appendix viii.

<sup>2</sup> Dana's Wheaton, note to § 475.

## CHAPTER VIII.

### BLOCKADE.

PART IV. § 257. BLOCKADE consists in the interception by a belligerent  
CHAP. VIII. of access to territory or to a place which is in the possession  
In what of his enemy. As it is obviously a mode by which severe  
blockade stress may be put upon the population subjected to it through  
consists. the interruption of communication with the external world  
which it entails, it is an invariable concomitant of all war-  
like operations by which control is gained over avenues through  
which such communication takes place. The conditions how-  
ever under which communication is interrupted by land and  
by sea are different, and they are such that for the purposes  
of international law blockade consists only in the intercep-  
tion of access by sea. On land it is enforced partly as a  
consequence of the possession by a belligerent of the rights  
of control which have been already mentioned, and partly  
through the material power of which he can avail himself  
at every moment within the range of his military occupation.  
Blockade on land therefore calls for no special rules for its  
maintenance; sovereignty in some cases and military occu-  
pation in others supply the requisite rights of control, and the  
material conditions of its exercise are simple. But at sea the  
rights of the neutral being equal to those of the belligerent  
except in so far as they are subordinated to the special needs  
of the latter, the neutral has *primá facie* a right of access to  
the enemy; and when this right is ousted by the assertion of  
the special needs of the belligerent, it must be shown that  
the latter is in a position to render the assertion effective,

the right which is set up by his needs being a bare one, like all other belligerent rights, and the conditions of maritime warfare being such that control over a space of water in which a naval force is stationed cannot be supposed to be effective as of course. Maritime blockade therefore calls for special rules defining the conditions under which it can be set up and those under which it continues to exist.

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CHAP. VIII.

It is agreed that for a maritime blockade to be duly set up and maintained—

1. The belligerent must intend to institute it as a distinct and substantive measure of war, and must bring his intention in some way to the knowledge of the neutrals affected.
2. It must have been initiated under sufficient authority.
3. It must be maintained by a sufficient and properly disposed force.

Conditions  
of its due  
institution  
and main-  
tenance.

It is endeavoured to give effect to these general rules by means of practices which enjoy very different degrees of authority.

§ 258. As a blockade is not a necessary consequence of a state of war, but has to be specially instituted, it would evidently be impossible to assume that a neutral possesses any knowledge of its existence until the fact of its establishment has been in some manner notified or brought home to him. So far not only is the general rule as a matter of fact agreed upon, but it could not stand otherwise. But opinions differ widely as to whether it is sufficient in order to justify the belligerent in seizing the property of the neutral that the knowledge of the latter shall be proved, or whether a formal notification must be served upon him.

How a  
neutral  
becomes  
affected  
with know-  
ledge of a  
blockade.

According to the view which finds its expression in English and North American practice, and which is adopted also by Prussia and Denmark<sup>1</sup>, the source of liability to seizure is

English  
and Ame-  
rican  
theory.

<sup>1</sup> See an analysis of the Prussian Prize Regulations in Bulmerincq (*Le Droit des Prises Maritimes*, *Rev. de Droit Int.* x. 240), and of the Danish Regulations (*ib.* 212).

PART IV. knowledge of the fact that a blockade has been established,  
 CHAP. VIII. together with the presumption that an existing blockade will under ordinary circumstances continue. A neutral therefore who sails for a port with full knowledge that it is blockaded at the moment when his voyage is commenced, ought to expect that it will be in the same state when he arrives; and anything which can be proved to affect him with knowledge at the former time will render him liable to the penalties imposed for violation of blockade.

French  
theory.

On the other hand, according to the view which is identified with French practice, and which is also followed by Italy, Spain, and Sweden<sup>1</sup>, the neutral is not expected to shape his course on any presumption with respect to the continuance or cessation of a blockade; and he is not injuriously affected by knowledge acquired at any time before he can experimentally test its existence as good on the spot which is subjected to it.

French  
practice.

Hence, although it has lately become customary for the French government at the commencement of a blockade to notify the fact of its existence to foreign governments as a matter of courtesy, their subjects are not considered to be affected by notice through them. Each neutral trader approaching the forbidden coast is individually warned by one of the blockading squadron, a vessel not engaged in the blockade being incompetent to affect the trader with notice, the fact of warning is endorsed on the ship's papers, with mention of the date and place of notification, and it is only for subsequent attempts to enter that the neutral is liable to seizure. The practice was consistently followed by France in blockading the Mexican ports in 1838, and those of the Argentine Republic in the same year; it has been equally respected during her recent European wars; and stipulations in accordance with it are found in many modern treaties concluded by her, as well as in a certain number of conventions

<sup>1</sup> For the Italian and Swedish rules see Bulmerincq (*ib.* 220 and 441); for the Spanish practice, Negrin, 213.

between other states. It is also adopted by several modern continental writers; who argue that to sail for a blockaded place in the hope of finding the entry freed by the chances of war, by the effects of weather, or by some other cause, is in itself an innocent act, and therefore not to be punished because the hope fails to be justified by the circumstances existing at the moment of arrival<sup>1</sup>.

The theory accepted in England and the United States is the natural parent of a more elastic usage. Notification is a convenient mode of fixing a neutral with knowledge of the existence of a blockade, but it is not the necessary condition of his liability to seizure. In strictness, if a neutral vessel sail with the destination of a blockaded port from a place at which the fact of blockade is so notorious that ignorance of its existence is impossible, confiscation may take place upon seizure without previous warning<sup>2</sup>. But in

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CHAP. VIII.

English  
and Ame-  
rican prac-  
tice.

<sup>1</sup> Ortolan, ii. 335-41. Calvo (§ 1150) considers that the French practice ought to be the accepted rule of law; Pistoye and Duverdy (i. 370) and Hautefeuille (tit. ix. chap. ii. sect. ii) hold that the special notification is necessary, and that a diplomatic notification ought also to be given.

For the French Regulations of 1870 see Bulmerincq in Rev. de Droit Int. x. 400.

The treaties in which France has inserted stipulations in conformity with her practice are those with Brazil, 1828 (De Martens, Nouv. Rec. viii. 60); with Venezuela, 1843 (Nouv. Rec. Gén. v. 172); with Ecuador, 1843 (ib. 411); with New Grenada, 1844 (id. vii. 621); with Guatemala, 1848 (id. xii. 11); with Chile, 1846 (id. xvi. i. 10); with Honduras, 1856 (ib. ii. 154); with Nicaragua, 1849 (ib. 191).

The treaties in which countries other than France have bound themselves by like provisions are those between the United States and Sweden in 1816 (De Martens, Nouv. Rec. iv. 258); the Hanseatic Towns and Mexico, 1828 (id. Nouv. Supp. i. 687); the United States and Sardinia, 1838 (id. xvi. 266); Austria and Mexico, 1842 (Nouv. Rec. Gén. iii. 448). The practice seems to have arisen out of the doctrine of the Second Armed Neutrality, in the treaties concluded between the members of which the principle was first laid down. De Martens, Rec. vii. 172, &c.

<sup>2</sup> The Columbia, i Rob. 156; The Adelaide Rose, ii Rob. 111, note; The Union, Spinks, 164. 'If a blockade *de facto* be good in law without notification, and a wilful violation of a legal blockade be punishable with confiscation, propositions which are free from doubt, the mode in which knowledge has been acquired by the offender, if it be clearly proved, cannot be of importance.' The Franciska, on appeal, x Moore, 46. But capture on the ground of notoriety



PART IV. practice notification of some sort is always given. If the  
 CHAP. VIII. blockade is instituted under the direct authority of the  
 government, the fact of its commencement is notified to foreign states. The information thus communicated affects their subjects, who must be supposed to be put in possession of the knowledge which is afforded with the express object of its being communicated to them. If therefore a vessel sails to a blockaded port at a time clearly later than that at which the general notification is matter of public knowledge, no special notification is required before seizure<sup>1</sup>. But the case is different when vessels sail before such time, or approach a port closed by a merely *de facto* blockade, which has been instituted on the authority of the officer commanding the belligerent force in the neighbouring seas, or which for some reason has not yet been the subject of a diplomatic notification. Knowledge of the fact cannot then be presumed, and vessels are consequently turned back with a like notice endorsed on their papers to that which is required under the French usage<sup>2</sup>. And a mitigation of the strict rule is introduced when a vessel sails with full knowledge of the existence of a blockade from a port at a great distance from the closed harbours. The presumption in favour of continuance of the blockade is of necessity weakened with a lapse of time sufficient for the completion of a long voyage; and it was held during the wars at the beginning of the century that a vessel coming from America into European waters was not rendered liable to capture by

would be looked upon with disfavour. Dr. Lushington, in adjudicating in the first instance in the case of the *Franciska*, said, 'Unless the notoriety of the blockade be so great, that according to the ordinary course of human affairs the knowledge thereof must have reached all engaging in the trade between the ports so blockaded, a warning to each vessel approaching is indispensably requisite.' Spinks, 135.

<sup>1</sup> The *Columbia*, loc. cit.; The *Neptunus*, ii Rob. 114; The *Vrow Johanna*, ii Rob. 109; Mr. Justice Story in *The Nereide*, ix Cranch (American), 440.

<sup>2</sup> *Vrow Judith*, i Rob. 151; The *Neptunus*, loc. cit. A vessel may sail with the intention of enquiring whether a blockade *de facto* is continued or not. *Naylor v. Taylor*, iv Manning and Ryland, 531.

mere destination to a blockaded port. Enquiry as to the continued existence or suspension of the blockade was under these conditions justifiable; but it was held that such enquiry ought to be made, not at the blockaded port, but at intermediate places, where fraud was less likely to be masked under enquiry, than at the mouth of the blockaded harbour<sup>1</sup>.

The practice of England and the United States is unquestionably better suited than that of France to the present conditions of navigation<sup>2</sup>. The electric telegraph and

The English practice to be preferred.

<sup>1</sup> The *Betsey*, i Rob. 334. The United States have stipulated for the mitigated practice of allowing a vessel to sail for a distant port notwithstanding the existence of blockade in treaties concluded in 1806 with England (De Martens, Rec. viii. 585); in 1816 with Sweden (id. Nouv. Rec. iv. 258); in 1828 with Brazil (id. ix. 62); in 1836 with Venezuela (id. xiii. 560); in the same year with Bolivia (id. xv. 113); in 1839 with Ecuador (Nouv. Rec. Gén. iv. 316); and in 1871 with Italy (Archives de Droit Int. 1874, p. 134). M. Calvo has misapprehended the effect of these treaties in adducing them as examples of the adoption of the French practice with respect to notification. He has shown an equal misapprehension of the English practice in treating as a middle term between it and that of France the Danish Regulations of 1864, providing that special notification is to be given to a vessel which, from the shortness of time which has elapsed since the issue of a general notification, has not had an opportunity of becoming acquainted with the existence of a blockade. Droit International, § 1156-7. M. Ortolan appears also to have fallen into error with respect to the practice of the United States, in saying, after stating the French practice, that 'c'est ainsi également, qu'agissent les États Unis d'Amérique.' Mr. Lincoln's Proclamation of April 19, 1861, no doubt stated that vessels would be individually warned; but Commodore Prendergast, in notifying the actual commencement of the blockade of the Virginian coast in July of the same year, said only that 'those coming from abroad, and ignorant of the blockade, will be warned off;' and the principle that sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects the vessel to capture, without special notice, was re-asserted with much emphasis by Chief Justice Chase in the case of the *Circassian*, ii Wallace, 151. It has always been a principle in American practice, and was affirmed by Mr. Justice Story in the case of the *Nereide*, ix Cranch, 440. In the case of the *Hiawatha* (ii Black, 675), which issued from a blockaded port during the civil war, it was contended that, under the Proclamation of April 19, a warning was necessary, but it was decided that it would be absurd to require a warning when the master of a vessel had actual previous knowledge. See also post, p. 626.

<sup>2</sup> MM. Bluntschli (§ 832) and Heffter (§ 156) partially adopt the English practice in admitting that special notification to the neutral trader is unneces-

**PART IV.** newspapers spread authentic news rapidly and universally;  
**CHAP. VIII.** steam has reduced the length of voyages and rendered their duration certain; it can only be under rare circumstances, against the effect of which mitigations such as those introduced into English usage may easily provide, that a vessel will arrive innocently before a blockaded port. If capture for attempt to break a blockade is to be permissible at all, it must be morally permissible to capture under ordinary circumstances without individual notice; and if such capture is morally permissible, it is certainly to the advantage of neutral states to allow it to take place. Belligerents will not quietly suffer the results of commerce prejudicial to their warlike operations; and unless they are entrusted with weapons of sufficient strength to enable them to deal with it effectively, they will try, with more or less success, to throw responsibility upon the neutral states, to the confusion of legal distinctions which it is highly convenient to the latter to maintain, and to the vastly increased danger of national conflicts<sup>1</sup>.

Authority  
under  
which a  
blockade  
may be  
estab-  
lished.

§ 259. A blockade is considered to be an act of war which affects, of right, not only the subjects of a neutral state, but also persons and things partaking of the national character. Strictly, access to the blockaded place is forbidden to ships of war as well as merchant vessels. The establishment of a blockade is therefore so high an exercise of sovereign power that it can only be effected under the express or implied orders

sary; but they hold that capture can only be effected during an actual attempt at violation on the blockaded spot itself.

<sup>1</sup> During the American Civil War Chief Justice Chase, in speaking of the rule under which sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects a vessel to capture, declared that 'we are entirely satisfied with this rule. It was established, with some hesitation, when sailing vessels were the only vehicles of ocean commerce; but now when steam and electricity have made all nations neighbours, and blockade-running from neutral ports seems to have been organised as a business, and almost raised into a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights.' *The Circassian*, ii Wallace, 151.

of the government of a country; and the general instructions given to the commander of a belligerent force do not necessarily imply competent orders. If however he is operating at a considerable distance from home, he is supposed to be invested with such portion of the sovereign authority as may be required for the exigencies of the service; and it has even been held that when an officer not possessed of adequate powers had taken on himself to commence a blockade, captures effected under it might be made retrospectively valid by a subsequent adoption of his act by the state. The principle therefore in practice goes little further than to forbid subordinate officers from creating or varying a blockade at their will<sup>1</sup>.

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§ 260. The doctrine with regard to the proper maintenance of a blockade, which has been laid down by the English and American courts, which is approved of by English and American writers, and which is embodied in the policy of both countries, requires that a place shall be 'watched by a force sufficient to render the egress or ingress dangerous; or, in other words, save under peculiar circumstances, as fogs, violent winds, and some necessary absences, sufficient to render the capture of vessels attempting to go in or come out most probable<sup>2</sup>.'

Mainten-  
ance by a  
sufficient  
and  
properly  
disposed  
force.

Provided access is in fact interdicted, the distance at which the blockading force may be stationed from the closed port is immaterial. Thus Buenos Ayres has been considered to be effectually blockaded by vessels stationed in the neighbourhood of Monte Video; and during the Russian war in 1854 the blockade of Riga was maintained at a distance of

Practice of  
England  
and the  
United  
States.

<sup>1</sup> Phillimore, iii. § cclxxxviii; Calvo, § 1137; Bluntschli, § 831; The Rolla, vi Rob. 365; The Hendrick and Maria, i Rob. 148; The Franciska, x Moore, 46.

<sup>2</sup> The Franciska, Spinks, 115; Phillimore, iii. § ccxciii-iv; Bernard, 245; Kent, Lect. vii; Wheaton, pt. iv. chap. iii. § 28; Mr. Mason's instructions to the naval forces of the United States, 1846, quoted by Ortolan, ii. 343.

Among continental publicists M. Bluntschli accepts and repeats the English doctrine, § 829.

PART IV. one hundred and twenty miles from the town by a ship in  
 CHAP. VIII. the Lyser Ort, a channel three miles wide, which forms the  
 only navigable entrance to the gulf<sup>1</sup>.

It is impossible to fix with any accuracy the amount of danger in entry which is necessary to preserve the validity of a blockade. It is for the Prize Courts of the belligerent to decide whether in a given instance a vessel captured for its breach had reason to suppose it to be non-existent; or for the neutral government to examine, on the particular facts, whether it is proper to withhold or to withdraw recognition. In some cases, where a blockading squadron, from the nature of the channels leading to a port, can be eluded with ease, a large number of successful evasions may be insufficient to destroy the legal efficiency of the blockade. Thus during the American Civil War, the blockade of Charleston was usually maintained by several ships, of which one lay off the bar between the two principal channels of entrance, while two or three others cruised outside within signalling distance. This amount and disposition of force seem to have been thought by the British government amply sufficient to create the degree of risk necessary under the English view of international law, although from the peculiar nature of the coast a large number of vessels succeeded in getting out and in during the whole continuance of the blockade<sup>2</sup>.

This abstention from any pedantic interpretation of general rules extends to cases where, the force being adequate and the fact of blockade known, a ship enters owing to a momentary absence of a blockading vessel, not only when, as already mentioned, the absence is owing to weather, but even when it is caused by the chase of a prize. The blockade is not in these cases raised, and an endeavour to take advantage of such absence is looked upon as an attempted breach. On the other hand, the blockade ceases if an enemy's force succeeds, for however short a time, in driving off the

When a  
blockade  
ceases.

<sup>1</sup> The *Franciska*, loc. cit.

<sup>2</sup> Bernard, *Neut. of Great Britain*, chaps. x. and xii.

squadron which is charged with maintaining it<sup>1</sup>, or if vessels are diverted to other employment; and if a prize is pursued so far from the blockading station that a neutral ship on arriving near the entrance may fairly think that the blockade is abandoned, it may be held to be at least so far impaired that the neutral so attempting to enter is relieved from the natural penalty of his act<sup>2</sup>.

The opinions held by the majority of modern continental writers as to the conditions under which a blockade is efficiently maintained, differ in several important respects from the principles which guide the practice of England and the United States. They may perhaps be summarised as follows. The immediate entrance to a port must be guarded by stationary vessels; in such number as either to render entrance impossible, or at least to expose any ships running in to a cross fire from the guns of two of them. Any accidental circumstance which makes it temporarily impossible to

PART IV.  
CHAP. VIII.

Opinions  
of con-  
tinental  
writers.

<sup>1</sup> The *Frederic Molke*, i Rob. 87; The *Columbia*, i Rob. 156; The *Hoffnung*, vi Rob. 115; *Vos and Graves v. The Un. Ins. Cy.*, ii Johnson (American), 187; *Radcliff v. Un. Ins. Cy.*, vii Johnson, 53.

<sup>2</sup> Bernard, 239. See, on diversion, the note of Lord Lyons to Mr. Seward, May 22, 1861. The *Niagara*, blockading Charleston, had been sent away to intercept a cargo of arms expected at another part of the coast, and the harbour remained open for at least five days. Lord Lyons took for granted that an interruption had occurred, but the government of the United States, in view of the effect understood by it to flow from a general notification, refused to admit that any cessation had taken place.

It was formerly held in the United States, and would, it may be presumed, be still held in England, that 'although acquisitions made during war are not considered permanent until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as part of the domain of the conqueror so long as he retains the possession and government of them' (*Thirty Hogsheads of Sugar v. Boyle*, ix Cranch, 195), and consequently that a blockade is raised by the capture and occupation of the blockaded place by the attacking force. But during the American Civil War, a majority of judges in the Supreme Court asserted the doctrine that 'The occupation of a city by a blockading belligerent does not terminate a public blockade of it previously existing; the city being itself hostile, the opposing enemy in the neighbourhood, and the occupation limited, recent, and subject to the vicissitudes of war;' Chief Justice Chase in the *Circassian*, ii Wallace, 135. Compensation for wrongful capture was subsequently awarded in this case by the Mixed Commission on British and American Claims (North Am. No. 2, 1874, p. 124).

PART IV. go in puts an end to the blockade, and justifies a vessel in  
 CHAP. VIII. attempting to enter<sup>1</sup>. As, for three quarters of a century, by far the most extensive experience in blockades has fallen to the share of England and the United States, these opinions, whatever their abstract merits, labour under the disadvantage of being inconsistent with the most authoritative usage upon the subject. They are also much more rigid than the principles embodied in the Declaration of Paris, and accepted by the great majority of civilised nations. It is hardly necessary therefore to inquire upon what ground they are stated to represent existing law<sup>2</sup>. The signatory powers

<sup>1</sup> The opinions of the various writers are essentially identical, but differ from one another on some points. Heffter (§ 155) requires that vessels shall be '*stationnées en permanence et en assez grand nombre pour empêcher toute espèce de communication avec la place ou le port investi*;' but he does not hold that temporary absence entails cessation of the blockade. Ortolan (ii. 328) thinks that blockade of a harbour is not effective unless '*toutes les passes ou avenues qui y conduisent sont tellement gardées par des forces navales permanentes, que tout bâtiment qui chercherait à s'y introduire ne puisse le faire sans être aperçu et sans en être détourné*;' and considers (344) that if weather has caused the temporary absence of the blockading squadron, although the blockade is not raised, it is open to a vessel to attempt to enter, and if taken, to allege ignorance of the fact of blockade. Calvo (§ 1147) declares that the belligerent must have a sufficient force, so disposed as to become '*le maître de la mer territoriale qu'il occupe, et à pouvoir en interdire l'accès à tout navire étranger*;' apparently he requires that the ships shall be anchored. Hautefeuille (tit. ix. chap. ii. sect. i. § 1) says that '*le blocus n'existe qu'autant que le belligérant qui attaque un port place devant ce port un nombre de bâtiments de guerre suffisant pour en commander les abords par leur artillerie*;' and holds (sect. iii. § 2) that interruption from any cause terminates the blockade. To Gessner (179) '*la définition de la première neutralité paraît exemplaire*;' a blockaded port is therefore one where there is, '*par la disposition de la puissance qui l'attaque avec des vaisseaux arrêtés et suffisamment proches, un danger évident d'entrer*.' He exhausts the language of invective in assailing the existing doctrine and policy of England, and is fully satisfied with the American practice during the Civil War. It is not for me to attempt his extrication from the complicated inconsistencies in which he has thus involved himself. Pistoye and Duverdy (i. 365) confine themselves to cautious and accurate language. '*Il faut*,' they say, '*que la place soit investie par des forces suffisantes pour en rendre l'entrée périlleuse aux navires qui voudraient s'y introduire*.'

<sup>2</sup> A few treaties contain stipulations in agreement with the views of the foreign writers whom I have quoted. I am not aware that any blockade has ever been conducted under their provisions. In 1742 France and Denmark agreed that a blockaded port should be closed by two vessels at least, or by a battery of



of the Declaration of Paris, which is perfectly in harmony with English doctrine, were satisfied with declaring that 'blockades in order to be binding must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy <sup>1</sup>.'

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It may be remarked, apart from reference to existing law, and apart also from all question whether blockades ought to be permitted at every place where they are now lawful, that the experience of the civil war in America has proved the use of steam to assist so powerfully in their evasion, as to render it unwise to shackle the belligerent with too severe restrictions. If it is wished altogether to deprive blockades of efficacy, it would be franker and better to sweep them away altogether.

§ 261. According to the English theory, as fully as by that Effect of  
cessation

guns on land, and the same stipulation was made between Denmark and Genoa in 1789. The treaty between Holland and the Two Sicilies in 1753 prescribes that at least six ships of war shall be ranged at a distance slightly greater than gun-shot from the entrance, or else that the blockade may be maintained by shore batteries and other works. The First Armed Neutrality, in 1780, laid down that blockade must be effected with vessels stationary and sufficiently near to produce evident danger in entering. The Second Armed Neutrality put forward the same doctrine; but Russia, in her treaty with England in 1801, consented to substitute the words '*arrêtés ou suffisamment proches*,' for '*arrêtés et suffisamment proches*;' and the only treaty since concluded in which stringent stipulations are made is that between Denmark and Prussia in 1818, by which it was required that two vessels should be stationed before every blockaded port. Hautefeuille, tit. ix. chap. ii. sect. i. § 1; Gessner, 159; De Martens, Rec. vii. 263.

<sup>1</sup> For the Declaration of Paris see Appendix iiii. With reference to its meaning, Lord Russell, in 1863, wrote as follows: 'The Declaration of Paris was in truth directed against what were once termed "paper blockades;" that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man-of-war in the offing, or the like. . . . The interpretation, therefore, placed by Her Majesty's government on the Declaration was, that a blockade, in order to be respected by neutrals, must be practically effective. . . . It is proper to add, that the same view of the meaning and effect of the articles of the Declaration of Paris, on the subject of blockades, which is above explained, was taken by the representative of the United States at the Court of St. James' (Mr. Dallas) during the communications which passed between the two governments some years before the present war, with a view to the accession of the United States to that Declaration.' Lord Russell to Mr. Mason, Feb. 10, 1863, ap. Bernard, 293.



PART IV.  
CHAP. VIII.of block-  
ade.

adopted in France, the limitations imposed on neutral commerce by the right of blockade depend for their validity solely upon the fact that a blockade really exists at any given moment. A belligerent therefore has no power to subject a neutral to penalties from the time that a port ceases to be effectively watched, and the government of the United States was undoubtedly wrong in holding the opinion put forward by it in 1861, that a blockade established by notification continues in effect until notice of its relinquishment is given by proclamation<sup>1</sup>. It is no doubt the duty of a belligerent state which has formally notified the commencement of a blockade to give equal and immediate publicity to its discontinuance, but a vessel bound for or approaching a port at a time between the actual cessation of blockade and the public notification of the fact is not liable to confiscation. If a ship is captured under such circumstances, the utmost, but also the legitimate, effect of a notification is that the neutral, who has probably started with the intention of violating the blockade, and whose adventure has since become innocent from events with which he has had nothing to do, is bound to prove the existence of a state of facts which frees his property from the penalty to which it is *primâ facie* exposed. The presumption of the court will be that a regularly notified blockade continues to exist until that presumption is displaced by evidence<sup>2</sup>. In the case of a *de facto* blockade the burden of proof lies always upon the captor.

<sup>1</sup> Mr. Seward to Lord Lyons, May 27, 1861; ap. Bernard, 238.

<sup>2</sup> Bernard, 239. See also on the subject Phillimore, iii. ccxc, and *The Neptunus*, i Rob. 171; *The Circassian*, ii Wallace (American), 150; *The Baigorri*, ib. 480. The tenour of the instructions issued to naval officers by the French government in 1870 is given as follows by M. Bulmerincq (*Rev. de Droit Int.* x. 400):—‘Si les forces navales françaises étaient obligées, par une circonstance quelconque, de s’éloigner du point bloqué, les navires neutres recouvreraient le droit de se rendre sur ce point. Dans ce cas aucun croiseur français ne serait fondé à les entraver, sous prétexte de l’existence antérieure du blocus, s’il y a d’ailleurs la connaissance certaine de la cessation ou de l’interruption de ce blocus. Tout blocus levé ou interrompu doit être rétabli et notifié de nouveau dans les formes prescrites.’

§ 262. Neutral vessels lying in a belligerent port at the moment when it is placed under blockade are subjected to special usages with respect to which there is no difference of opinion. It would be obviously unjust to shut up the unoffending neutral in a common prison with the belligerent; on the other hand, the object of a blockade being to cut off all trade from the closed port, the operation would be to a great extent nullified if vessels within the harbour at the inception of the blockade were allowed to come out with cargo shipped after its commencement<sup>1</sup>. Hence, exit is allowed only under certain conditions, and it is necessary, if a vessel is to appear at the mouth of the port in a state according with these conditions, that she shall be informed beforehand of the fact that they have been imposed. A general notification is therefore sent to the authorities of the blockaded port, announcing the commencement of the blockade and specifying a time during which vessels may come out. It being certain that a notice affecting the narrow space of a particular port must of necessity become known to every person within it, the practice of most nations dispenses with further warning; and after a blockade has existed for a while, 'it is impossible for those within to be ignorant of the forcible suspension of their commerce,' so that, even without notice, warning to each ship is superfluous<sup>2</sup>. But the French perhaps extend the privilege of special warning to vessels issuing from a blockaded port with cargo laden after establishment of the blockade<sup>3</sup>.

The period which is allowed for the exit of ships is usually

<sup>1</sup> It would seem however that Prussia and Denmark allow ships to come out with cargo shipped after the commencement of the blockade. Rev. de Droit Int. x. 212, 239.

<sup>2</sup> The *Vrow Judith*, i Rob. 152. In 1855 it was laid down that '*prima facie* every vessel whatsoever, laden with a cargo, quitting a blockaded port, is liable to condemnation on that account, and must satisfactorily establish her exception to the general rule.' The *Otto and Olaf*, Spinks, 259.

<sup>3</sup> The *Eliza Cornish*, Pistoye et Duverdy, i. 387. The Instructions of 1870 however seem to be silent upon the point, and by expressly mentioning individual notification to ingoing vessels while keeping silence as to outcoming vessels

PART IV. fixed at fifteen days<sup>1</sup>, and during this time vessels may issue  
 CHAP. VIII. freely in ballast or with a cargo *toná fide* bought and shipped before the commencement of the blockade<sup>2</sup>. Probably fifteen days should be looked upon as a minimum period, many ports being so situated as to render exit from them within any given time more difficult than from those which have usually been the subject of the fifteen days' rule. In 1838, on establishing the blockade of Buenos Ayres, France allowed neutral ships to come out for forty-two days<sup>3</sup>. It does not appear what circumstances then demanded so exceptional an indulgence; but as sea-going vessels now ascend to Rosario, it is clear that if the Argentine ports were blockaded at the present day, a considerable time might elapse before the existence of a blockade was known to all neutral vessels, and that they might have great difficulty in reaching the mouth of the river within any short period. Even where a port on a navigable river is much nearer to its mouth than in the supposed case, special circumstances might often require an extension of time. When New Orleans was blockaded in 1861 the water on the bar of the Mississippi was unusually low, and the commander of the blockading squadron extended the permitted time in favour of vessels of deep draught<sup>4</sup>.

suggest that individual notification would not now be given in the latter case. Negrin believes the latter to be the French practice; p. 213.

A few exceptional treaties provide for special warning to vessels issuing with cargo laden after the beginning of the blockade. These have been concluded between the Hanseatic Towns and Mexico, 1828 (De Martens, *Nouv. Supp.* i. 684); the United States and Brazil, 1828 (*Nouv. Rec.* ix. 62); United States and Mexico, 1831 (*id.* x. 340); United States and Venezuela, 1836 (*id.* xiii. 560); United States and Bolivia, 1836 (*id.* xv. 120); France and Ecuador, 1843 (*Nouv. Rec. Gén.* v. 410); United States and Italy, 1871 (*Archives de Droit Int.* 1874, p. 134).

<sup>1</sup> This time was given in 1848 and 1864 by Denmark; by England and France during the Crimean War; by the United States during the Civil War; and by France in the war of 1870.

<sup>2</sup> The *Vrow Judith*, 1 Rob. 152; The *Franciska*, Spinks, 122; Heffter, § 157; Bluntschli, § 837. But a vessel must not enter in ballast to bring away a cargo bought before the commencement of a blockade. The *Comet*, Edwards, 32.

<sup>3</sup> De Martens, *Nouv. Rec.* xv. 503.

<sup>4</sup> Consul Mure to Lord John Russell, June 6, 1861, ap. Bernard, 242.

§ 263. The acts which constitute a violation of blockade necessarily vary with the theory which is held by the belligerent maintaining the blockade as to the conditions of its legality; and their nature has been already to a great extent indicated in discussing the effect of notification. Of the French practice it is sufficient to say that, as it does not admit a presumption in favour of the continuance of a blockade, a distinct attempt to cross the actual barrier by force or fraud is, as a general rule, necessary to justify condemnation. Occasionally however an inference as to intention seems to be allowed, as in the case of a vessel captured before actually endeavouring to enter a blockaded port, but while making for it after having received in the course of her voyage a regular notification from a belligerent cruiser<sup>1</sup>. The English and American courts, on the other hand, in arguing from a presumption of continuance to the intention of the neutral trader, necessarily subject to investigation all acts done from the commencement of his voyage. If it appears from these that, though anxious to go to the blockaded port, and sailing with that destination, he had no intention of braving the belligerent prohibition, his property will not be condemned. Thus a vessel has been held innocent which sailed from America for Hamburg with an intermediate destination to an English or neutral port for enquiry; and in another case, although the ship's papers did not show in distinct terms at what place enquiry was to be made, she was released on fair grounds being afforded for the inference that an intention to enquire really existed<sup>2</sup>.

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CHAP. VIII.

What acts  
constitute  
a breach  
of block-  
ade.

But acts of doubtful character will, in the absence of full explanation, be interpreted against the trader. Thus vessels running for a port, known by them to be blockaded, under

<sup>1</sup> Calvo, § 1176. Ortolan (Dip. de la Mer, ii. 349 and 353) approves of the practice of the English courts with respect to vessels approaching a blockaded port on the pretext of enquiring whether the blockade still subsists. La Carolina, Pistoye et Duverdy, i. 381.

<sup>2</sup> The Despatch, i Acton, 163.

PART IV. pretext of taking a pilot on board, because of falsely alleged  
CHAP. VIII. unseaworthiness, have been held liable to seizure; and the enquiries which it is eminently proper to make at a place sufficiently distant from the blockaded harbour must not be effected at its very mouth<sup>1</sup>.

During the American Civil War the courts of the United States strained and denaturalised the principles of English blockade law to cover doctrines of unfortunate violence. A vessel sailing from Bordeaux to Havana, with an ulterior destination to New Orleans, or in case that port was inaccessible, to such other place as might be indicated at Havana, was condemned on the inference that her owner intended the ship to violate the blockade if possible, notwithstanding that the design might have been abandoned on the information received at the neutral port<sup>2</sup>; and goods sent from one neutral port to another within the same dominions with an intent, formed either at the time of shipment or afterwards, of forwarding them to a place under blockade were condemned, and carried with them to a common fate the vessel in which they were embarked, notwithstanding that their transhipment was intended, unless there was reason to believe that the owners of the vessel 'were ignorant of the ulterior destination of the cargo, and did not hire their ships with a view to it<sup>3</sup>.'

A vessel which has succeeded in effecting a breach of

<sup>1</sup> 'The neutral merchant is not to speculate on the greater or less probability of the termination of a blockade, to send his vessels to the very mouth of the river, and say: "If you do not meet with the blockading force, enter. If you do, ask a warning and proceed elsewhere." Who does not perceive the frauds to which such a rule would be introductory?' *The Irene*, v Rob. 80. In *The Cheshire*, iii Wallace (American), 235, Mr. Justice Field says: 'If approach for enquiry were permissible, it will be readily seen that the greatest facilities would be afforded to elude the blockade;' and see *The Hurtige Hane*, ii Rob. 127; *The Charlotte Christine*, vi Rob. 101; *The James Cook*, Edwards, 264.

<sup>2</sup> *The Circassian*, ii Wallace, 135.

<sup>3</sup> *The Bermuda*, iii Wallace (American), 574; *The Stephen Hart*, ib. 559. It is sufficiently curious that any continental publicists should claim the United States as adhering to the French practice, in face of the extreme doctrine enforced in these and like cases.

blockade is not exonerated by her success from the consequences of her illegal act. If a ship that has broken a blockade is taken in any part of the same voyage, she is taken *in delicto*; the offence is not terminated until she reaches the end of the voyage, and the voyage is understood to include her return<sup>1</sup>; on this point, the breach having been in fact committed, the French doctrine can be, and perhaps is, in unison with that of England<sup>2</sup>. If the blockade is raised during the voyage, the liability to capture comes to an end, the existence of the offence being dependent on the continuance of the state of things which gave rise to it<sup>3</sup>.

§ 264. As a general rule the penalty for a breach of blockade is the confiscation of both ship and cargo; but if their owners are different, the vessel may be condemned irrespective of the latter, which is not confiscated when the person to whom it belongs is ignorant at the time of shipment that the port of destination is blockaded, or if the master of the vessel deviates to a blockaded harbour. If however such deviation takes place to a port the blockade of which was known before the ship sailed, the act is supposed to be in the service of the cargo, and the complicity of its owner is assumed<sup>4</sup>.

§ 265. There are a few cases in which neutral property can be brought into or out of a blockaded port or town without the commission of a legal breach.

When a maritime blockade does not form part of a combined operation by sea and land, internal means of transport by canals, which enable a ship to gain the open sea at a

<sup>1</sup> Wheaton, Elem. pt. iv. chap. iii. § 28. The right of capture on the return voyage was maintained by the United States courts during the civil war. Dana's Wheaton, note to § 523.

<sup>2</sup> Ortolan (Dip. de la Mer, ii. 354), Hautefeuille (tit. xiii. chap. i. sect. i. § 3), and Bluntschli (§ 836) refuse even in this case to admit the right to seize elsewhere than within the blockaded spot.

<sup>3</sup> The Lisette, vi Rob. 378; Ortolan, ib. 356.

<sup>4</sup> The Adonis, v Rob. 258; The Mariana Flora, vii Wheaton, 57; The Alexander, iv Rob. 93; The Panaghia Rhomba, Moore's P. C. Reps. xii. 180.

PART IV. point which is not blockaded, may be legitimately used.  
CHAP. VIII.

The blockade is limited in its effect by its own physical imperfection. Thus, during a blockade of Holland, a vessel and cargo sent to Embden, which was in neutral territory, and issuing from that port, were not condemned <sup>1</sup>.

Again, if a vessel is driven into a blockaded port by such an amount of distress from weather or want of provisions or water as to render entrance an unavoidable necessity, she may issue again, provided her cargo remains intact <sup>2</sup>. And a ship which has been allowed by a blockading force to enter within its sight, is justified in assuming a like permission to come out; but the privilege is not extended to cargo taken on board in the blockaded port <sup>3</sup>.

The right possessed by a belligerent of excluding neutral ships of war from a blockaded place is usually waived in practice as a matter of international courtesy; and for a like reason the minister of a neutral state resident in the country of the blockaded ports is permitted to despatch from it a vessel exclusively employed in carrying home distressed seamen of his own nation <sup>4</sup>.

Blockade  
of river  
partly in  
neutral  
territory.

§ 266. The right of a belligerent to blockade the territory of his enemy is sometimes complicated by the territorial rights of conterminous governments. If one bank of a river is within a neutral state, or if the upper portion of its navigable course is beyond the frontier of the hostile country, a belligerent can only maintain a blockade so far as is consistent with the right of the neutral to preserve free access to his own ports or territory <sup>5</sup>. Thus a blockade of Holland was held not to be broken by a destination to Antwerp <sup>6</sup>. And during the American Civil War, the Courts of the

<sup>1</sup> The Stert, iv Rob. 65.

<sup>2</sup> The Charlotta, Edwards, 252; The Hurtige Hane, ii Rob. 127. The general principle is stated by Bluntschli, § 838.

<sup>3</sup> The Juffrow Maria Schroeder, iii Rob. 160.

<sup>4</sup> Ortolan, Dip. de la Mer, ii. 329; Phillimore, iii. § cccxiii.

<sup>5</sup> Ortolan, ib. 332; Calvo, § 1163.

<sup>6</sup> The Frau Ilsebe, iv Rob. § 6.

United States conceded that trade to Matamoros, on the Mexican shore of the Rio Grande, was perfectly lawful; but the Supreme Court laid down the rule that it was a duty incumbent on vessels with the neutral destination to keep south of the dividing line between the Mexican and Texan territory; and in the case of vessels captured for being north of that line, refused, while restoring them, to allow their costs and expenses<sup>1</sup>.

It is to be hoped that a rule so little consistent with the right of neutrals to uninterrupted commerce with each other will not be drawn into a precedent.

<sup>1</sup> The *Peterhoff*, v Wallace (American), 54; The *Dashing Wave*, ib. 170; The *Volant*, ib. 178; The *Science*, ib. 179.



## CHAPTER IX.

### NEUTRAL GOODS IN ENEMY'S SHIPS.

PART IV. § 267. THE question whether it is open to a neutral to  
CHAP. IX. avail himself of belligerent vessels for the maritime transport  
of goods in themselves innocent, has been, like the question  
Conflicting theories on the subject. of the effect of neutral transport upon belligerent merchandise,  
the subject of lively debate, and like it also it has now been  
reduced into insignificance by the Declaration of Paris.

Two doctrines are held on the subject. According to one, the neutral property retains its freedom notwithstanding its association with that of an enemy; according to the other, contact with confiscable property taints it so irredeemably as to subject it to the fate of the latter. The theoretic ground upon which the former doctrine rests is that neutral goods are *primá facie* free; they can be captured only because of some assistance which a belligerent immediately or remotely derives from them in the conduct of his war; goods in themselves incapable of rendering him such assistance cannot change their nature because they are carried by him; and neutrals cannot therefore be expected to refrain from conveying their property to market by means which happen to be convenient to them. The second doctrine is really the offspring of a pretension to forbid all intercourse between neutrals and an enemy; but by attaching itself to a principle, which though arbitrary is not inequitable, and which serves the interests of neutrals, it has blinded the world to its true

nature ; and as part of the formula, ' Free ships, free goods ; PART IV. enemy ships, enemy goods,' it has been adopted into the CHAP. IX. policy of nations which have shown themselves intolerant of far less questionable usages.

§ 268. The earliest custom in the matter agrees with the <sup>Early</sup> juster and less artificial view. The rules of the *Consolato del* <sup>usage.</sup> *Mare*, which enabled a belligerent to seize the property of his enemy wherever he found it, prohibited him at the same time from robbing his friend. While therefore an enemy's ship was subjected to confiscation, its neutral cargo remained free, and it was even provided that the owners of the cargo should be permitted to buy the vessel from the captain at a reasonable price, in order to avoid the inconvenience and loss of being carried into his ports<sup>1</sup>. An early usage to a like effect may probably have existed in the northern seas, for the Hollanders, during war with Lübeck and other Hanse Towns in 1438, ordered that goods belonging to neutrals found in an enemy's ship should not be made prize ; and it is said that until the middle of the sixteenth century France observed a like rule<sup>2</sup>. But in 1584 the first of a series of edicts appeared in the latter country which established a national custom of peculiar harshness. It was ordered that ' if the ships of our subjects make a prize in time of war of enemy's ships, in which are persons, merchandise, or other goods of our said subjects or allies, the whole shall be declared good prize as if the whole belonged to our said enemies<sup>3</sup>.'

England, on the other hand, generally maintained the <sup>Practices</sup> doctrine of the *Consolato del Mare* ; but in the beginning of <sup>in the</sup> the seventeenth century its views do not appear to have been <sup>seven-</sup> <sup>teenth</sup> <sup>century.</sup> thoroughly fixed, for in 1626 a French negotiator, the Maréchal de Bassompierre, found the report of commissioners

<sup>1</sup> See a translation of the text of the *Consolato* in Ortolan, *Dip. de la Mer*, ii. 68, or Heffter, § 163.

<sup>2</sup> Hübner, 1<sup>re</sup> partie, chap. i. § 8 ; Ortolan, *ib.* 100.

<sup>3</sup> Ortolan, *ib.* 101. ' *Res non hostium non bene capitur ullibi* ' was the opinion of Albericus Gentilis, *De Jure Belli*, lib. ii. c. 22.

PART IV. to whom certain points of maritime law had been referred by  
 CHAP. IX. — the English government to be in this point fully in accordance with the usage of his own country<sup>1</sup>. France again perhaps recurred for a time to the general practice by the Royal Declaration of 1650, which granted the freedom of neutral goods in enemy's ships; but she concluded a series of treaties from 1659 downwards, in which her older custom was embodied, and as she formally re-enacted the confiscation of neutral goods by the Ordonnance of 1681, it may be doubted whether the Declaration of 1650 was ever acted upon, and whether therefore it forms a real exception to the settled policy of the country<sup>2</sup>.

Whatever the practice of other countries may have been, their external policy was determined by the degree to which they were anxious to acquire or retain carrying trade in war time. It was impossible to obtain the freedom of belligerent goods committed to their care unless a corresponding advantage was offered to belligerents; hence the Dutch, who made it a cardinal object to secure the immunity of their flag, were obliged to buy the privilege by giving up their own merchandise when carried in a belligerent ship; and in all treaties which they concluded the fate of the cargo was determined by that of the vessel<sup>3</sup>. They were no doubt the more ready to make the concession that neutrals seldom require to make use of belligerent vessels to any large extent; and that they consequently gain a valuable privilege at a small price.

<sup>1</sup> Ortolan, *Dip. de la Mer*, ii. 114.

<sup>2</sup> Valin, *Ord. de la Marine*, ii. 254. M. Ortolan (ii. 104) suggests that the Ordonnance of 1681 was intended only to apply to allies in a common war, and not to neutrals; and its language is not perhaps absolutely inconsistent with his construction, it being only specified that '*les marchandises de nos sujets et alliés qui se trouveront dans un navire ennemi seront de bonne prise.*' But as the law was always administered on the assumption that neutrals were affected by its provisions, M. Ortolan's interpretation is no doubt the offspring of a patriotic wish to lessen so far as possible the contrast which exists between the historic doctrines of his country and those which she has adopted in recent times.

<sup>3</sup> Phillimore, iii. § clxxx; Manning, 319. See the Dutch treaties enumerated, p. 604.

In the eighteenth century the history of the two doctrines continued to follow the line sketched in the previous period. PART IV.  
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The private custom of England preserved the ancient rule under which neutral goods are free. France, on the other hand, had retained and reiterated in her internal legislation the severities in which she stood alone, until Spain became her imitator under the Bourbon kings. In 1704, 1744, and 1778 the principle that goods become enemy under an enemy's flag was freshly asserted; and Spain, by Ordinances in 1702, 1718, and 1779, modelled her laws on the French Regulations in force at the respective dates<sup>1</sup>. Down to the time of the First Armed Neutrality a large number of treaties, for the same reason as in the preceding century, generally stipulated for the condemnation of neutral merchandise in belligerent vessels<sup>2</sup>; but they seem to have had little effect in changing the bent of opinion in the direction of the practice for which they stipulated. Writers so different as Vattel and Hübner could on this point find themselves in accord<sup>3</sup>, and England was of one mind with the members of the Armed Neutrality. It was impossible for neutrals to ask more than England already spontaneously gave to them, and accordingly the programme of the Armed Neutralities contained no articles on the subject. But in the present century the confiscation of neutral goods reappears in the treaties made by France and the United States, set off as usual against the

<sup>1</sup> Ortolan, *Dip. de la Mer*, ii. 108.

<sup>2</sup> See the treaties mentioned, p. 605; except the treaty between England and Spain in 1713, which contains no stipulation in the matter. Sir R. Phillimore (iii. § clxxxi), adopting a computation made by Mr. Ward, says that thirty-four treaties from 1713 to 1780 make no mention of the principles, Free ships, free goods; Enemy ships, enemy goods.

<sup>3</sup> 'Les effets des peuples neutres, trouvés sur un vaisseau ennemi, doivent être rendus au propriétaire, sur qui on n'a aucun droit de les confisquer, mais sans indemnité pour retard, dépérissement, &c. La perte que les propriétaires neutres souffrent en cette occasion est un accident auquel ils se sont exposés en chargeant sur un vaisseau ennemi; et celui qui prend ce vaisseau, en usant du droit de la guerre, n'est point responsable des accidents qui peuvent en résulter, non plus que si son canon tue sur un bord ennemi un passager neutre, qui s'y rencontre pour son malheur.' Vattel, liv. iii. chap. vii. § 116.

PART IV. freedom of enemy's goods in neutral vessels; though at the same time the United States have always distinctly acknowledged that under international common law the goods of neutrals in enemy's vessels are free<sup>1</sup>.

CHAP. IX.

Present  
state of  
the ques-  
tion.

Thus while England and the United States were committed, apart from treaties, to the view that the goods of neutrals in course of transport by a belligerent are free, the minor maritime states were led by their interests to adopt the same doctrine; and France stood alone with Spain in the assertion that their confiscation was permitted by accepted usage. When therefore France, in compliance with the request of England, abandoned her national practice in 1854, Spain remained the only country which adhered to it in principle; and the Declaration of Paris has probably secured its abandonment beyond recall.

Liability  
of neutral  
to inci-  
dental loss  
from cap-  
ture.

§ 269. It is to be noticed that though neutral property in enemy ships possesses immunity from confiscation, the neutral owner is not protected against loss arising incidentally out of the association with belligerent property in which he has chosen to involve his merchandise. Just as a neutral individual in belligerent territory must be prepared for the risks of war and cannot demand compensation for loss or damage of property resulting from military operations; so, if he places his property in the custody of a belligerent at sea, he can claim no more than its bare immunity from confiscation, and he is not indemnified for the injury accruing through loss of market and time, when it is taken into the captor's port, or in some cases at any rate for loss through its destruction with the ship.

<sup>1</sup> See the treaties enumerated, p. 608. *The Atalanta*, iii Wheaton, 415. 'It is true that sundry nations have in many instances introduced by their special treaties another principle between them, that enemy bottoms shall make enemy goods, and friendly bottoms, friendly goods; but this is altogether the effect of particular treaties, controlling in special cases the general principle of the law of nations, and therefore taking effect between such nations only as have so agreed to control it.' Mr. Pickering to Mr. Pinckney, *American State Papers*, i. 559.

In 1872 the French Prize Court gave judgment in a case, arising out of the war of 1870-1, in which the neutral owners of property on board two German ships, which had been destroyed instead of being brought into port, claimed restitution in value. It was decided that though 'under the terms of the Declaration of Paris neutral goods on board an enemy's vessel cannot be seized, it only follows that the neutral who has embarked his goods on such vessel has a right to restitution of his merchandise, or in case of sale to payment of the sum for which it may have been sold; and that the Declaration does not import that an indemnity can be demanded for injury which may have been caused to him either by a legally good capture of the ship or by acts of war which may have accompanied or followed the capture;' in the particular case 'the destruction of the ships with their cargoes having taken place under orders of the commander of the capturing ship, because, from the large number of prisoners on board, no part of the crew could be spared for the navigation of the prize, such destruction was an act of war the propriety of which the owners of the cargo could not call in question, and which barred all claim on their part to an indemnity <sup>1</sup>.'

It is to be regretted that no limits were set in this decision to the right of destroying neutral property embarked in an enemy's ship. That such property should be exposed to the consequences of necessary acts of war is only in accordance with principle, but to push the rights of a belligerent further is not easily justifiable, and might under some circumstances amount to an indirect repudiation of the Declaration of Paris. In the case for example of a state the ships of which were largely engaged in carrying trade, a general order given by its enemy to destroy instead of bringing in for condemnation would amount to a prohibition addressed to neutrals to employ as carriers vessels, the right to use which was expressly conceded to them by the Declaration

<sup>1</sup> Calvo, § 1242.

PART IV. in question. It was undoubtedly intended by that Declaration that neutrals should be able to place their goods on board belligerent vessels without as a rule incurring further risk than that of loss of market and time, and it ought to be incumbent upon a captor who destroys such goods together with his enemy's vessel to prove to the satisfaction of the prize court, and not merely to allege, that he has acted under the pressure of a real military necessity.

CHAP. IX.

## CHAPTER X.

### VISIT AND CAPTURE.

§ 270. VISIT is the means by which a belligerent as- PART IV.  
certains whether a mercantile vessel carrying the flag of a CHAP. X.  
neutral state is in fact neutral, and by which he examines Object of  
whether she has or has not been guilty of any breach of the visit and  
law. By capture he gives effect to his rights over neutral capture.  
property at sea which has become noxious to him in any  
of the ways indicated in the preceding chapters, and puts  
himself in a position to inflict the appropriate penalty.

§ 271. As the rights possessed by the belligerent of con- Who can  
trolling intercourse between neutrals and his enemy is an visit.  
incident of war, and as war can only be waged by or under  
the authority of a state, the rights of visit and capture must  
be exercised by vessels provided with a commission from their  
sovereign.

All neutral mercantile vessels are subject to visit upon Who is  
the high seas, and within the territorial waters of the belli- liable to  
gerent or his enemy. On the other hand, as the pretension visit.  
to search vessels of war, which formed a grave matter of  
contest in the early part of the century, can no longer be  
seriously urged, private vessels of the neutral state are the only  
subjects of the belligerent privilege. It is incumbent on  
all such vessels to be provided with certain documents for  
the proof of their neutral character, and of the innocence  
of the adventure in which they are engaged, and it is agreed



PART IV. that they are obliged as a general rule to produce these proofs  
 CHAP. X. on the summons of a duly authorised person.

Whether  
 convoyed  
 ships can  
 be visited.

History of  
 the ques-  
 tion.

§ 272. But it is a controverted point whether neutral merchant vessels are liable to be visited, and are bound to suffer the visit, when sailing under convoy of ships of war of their own nation. The question was first mooted in 1653, when, during the war between England and the United Provinces, Queen Christina of Sweden issued a declaration, reciting that the goods of her subjects were plundered by privateers, directing ships of war to be always ready to convoy such vessels as might desire protection, and ordering the convoying ships 'in all possible ways to decline that they or any of those that belong to them be searched<sup>1</sup>.' The Peace of Westminster, in 1654, by putting an end to the existing war, prevented any immediate occasion of dispute from arising, and no subsequent attempt seems to have been made by Sweden to act upon the policy of the directions. The United Provinces however, finding themselves in turn in the position of neutrals, shortly afterwards put forward like claims. In 1654, some Dutch merchant vessels under convoy of a man of war having been searched by the English, the States-General admitted that 'no reasonable complaints could be made,' although they 'were persuaded that such visitation and search tended to an inconveniency of trade;' but two years afterwards De Ruyter convoyed ships from Cadiz to Flanders laden with silver for the use of the Spanish troops in the latter country, and successfully resisted an attempt to visit made by the commodore of an English squadron. In the end the Dutch agreed that the papers of the convoyed ships should be exhibited by the man of war in charge, and that on sufficient ground a suspected vessel might be seized and carried into the belligerent port<sup>2</sup>. The compromise, no doubt, soon became a dead letter<sup>3</sup>; and nothing further was heard

<sup>1</sup> Thurloe's State Papers, i. 424.

<sup>2</sup> Thurloe, ii. 504; Calvo, § 1219.

<sup>3</sup> The article in the maritime code of Denmark of 1683, quoted by Ortolan

of the immunities claimed for convoyed ships until 1759, when the Dutch, who took improper advantage of a special privilege of trade with the French colonies which had been granted to them, and who besides carried on a large traffic in munitions of war and materials of naval construction with the home ports of France, fruitlessly endeavoured to cover their illicit transactions by reviving the pretension<sup>1</sup>. It was during the War of American Independence that the doctrine was first seriously urged. In 1780 orders were given by the Dutch government 'that a certain number of men of war should be ready for the future to convoy naval stores to the ports of France,' and the Count van Byland was directed to resist the visit and search of a fleet of vessels so laden, which were sailing in his charge. Some of the vessels were seized by an English force, and were carried into Portsmouth with the convoying ship, which had attacked that of the English commodore. In the lively recriminations which ensued Holland warmly maintained the proposition that convoyed merchantmen could not be searched; and when, a few months afterwards, it found itself at war with England, it was obliged in consistency as a belligerent to adopt the principle of which it had tried to reap the advantage as a neutral<sup>2</sup>. In 1781 a dispute arose between Great Britain and Sweden on the subject of six merchantmen under convoy which an English vessel had attempted to visit; and on an

(ii. 266) and Gessner (302) as affording another case in which exemption from visit was claimed in favour of convoyed ships, is really a direction to armed merchant vessels sailing together to resist visit whenever they are strong enough. It represents an attempt to get rid of visit altogether. Hautefeuille (tit. xi. chap. iii. sect. i.) admits that '*Hollande elle-même chercha par tous les moyens à exercer le droit de visite sur les navires convoyés toutes les fois qu'elle se trouva partie belligérante.*'

<sup>1</sup> It appears from a Report of Admiral Boscawen that complaint was made by the Dutch government that he had caused certain merchantmen under convoy to be searched. He says that he acted upon 'certain advice that the Dutch and Swedes carried cannon, powder, and other warlike stores to the enemy.' Ann. Register for 1759, p. 266.

<sup>2</sup> De Martens, *Nouvelles Causes Célèbres*, i. 165; Lord Stanhope, *Hist. of England*, vii. 44; De Martens, iii. 281.

PART IV. appeal being made by the latter power to Russia, the govern-  
 CHAP. X.  
 ——— ment of the Empress declared that it considered the principle of the immunity of convoyed vessels to be founded on the principles of the Armed Neutrality. It was also embodied before the end of the century in six treaties made by the Baltic powers, and in one between Holland and the United States<sup>1</sup>. It had therefore acquired such consistency and authority as it could gain by becoming a part of the deliberate policy of a knot of states possessing very defined and permanent interests. But the doctrine had no claim to the position assigned to it by Count Bernstorff, when, on the occasion of a dispute arising in the year 1800 out of the capture of some Danish vessels by an English squadron, he argued that the privilege of visiting convoyed ships did not exist at common law, because the right to visit at all being a concession made to the belligerent, it could only exist in so far as it was expressly conferred by treaty<sup>2</sup>. There can be no question that the practice of visiting convoyed vessels had been universal until 1781; and that frequent treaties, in specifying the formalities to be observed, without limiting the extent of the right, had incidentally shown that the parties to them regarded the current usage as authoritative.

Throughout the revolutionary wars England maintained the traditional practice, and imposed her doctrine by treaty upon the Baltic powers. In consequence of the refusal of a Danish frigate, the *Freya*, to permit the search of her convoy, a second dispute occurred between England and Denmark, which was ended, under threat of an immediate rupture, by a convention under which the latter power engaged to suspend its convoys until future negotiations

<sup>1</sup> United Provinces and United States, 1782 (De Martens, Rec. iii. 437); Russia and Denmark, 1782 (ib. 475); Sweden and the United States, 1783 (ib. 571); Prussia and the United States, 1785 (id. iv. 43); Russia and France, 1787 (ib. 212); Russia and the Two Sicilies, 1787 (ib. 238); Russia and Portugal, 1787 (ib. 328).

<sup>2</sup> Count Bernstorff to Mr. Merry, ap. Ortolan, ii. Annexes E.

should have effected a definitive arrangement<sup>1</sup>. Immediately afterwards the Second Armed Neutrality laid down as one of its principles that the declaration of the officer commanding a vessel in charge of merchantmen should be conclusive as to the innocence of the traffic in which they were engaged, and that no search should be permitted<sup>2</sup>. But in the treaties concluded with England in 1801 and 1802, Russia, Sweden, and Denmark abandoned the principle which they had striven to introduce, and consented that though visit was not to take place unless ground for suspicion existed, the belligerent commander should have the power of making it at his discretion, in presence, if required, of a neutral officer, and of carrying the suspected vessel into one of the ports of his country if he should see reason to do so<sup>3</sup>. In thus agreeing to limit the exercise of the right, the principle of which she preserved, England softened on her part the rigour of her usual practice, gaining, as the price of her concession, the full abandonment of the principle of the freedom of enemy's goods on board neutral ships, which had also been adopted by the Armed Neutrality. But the treaties concluded between England and the three other parties to this compromise in 1812 and 1814 placed matters on their old footing, and left the Baltic powers free to assert, and Great Britain to refuse, the immunity of convoyed vessels<sup>4</sup>. Since then France has accepted the principle of this freedom from visit in six treaties, all with American republics; and the United States have embodied it in thirteen treaties, of which all, with two exceptions, have also been entered into with states on the same continent<sup>5</sup>. But there has already been occasion to remark

PART IV.  
CHAP. X.Modern  
practice.

<sup>1</sup> August 29, 1800; De Martens, Rec. vii. 149.

<sup>2</sup> Conventions to this effect were signed between Russia and Denmark in Dec. 1800, and between Russia and Sweden and Russia and Prussia; De Martens, Rec. vii. 172, 181, 188. See Appendix vii.

<sup>3</sup> De Martens, vii. 264, 273, 276.

<sup>4</sup> De Martens, Nouv. Rec. i. 481 and 666, and iii. 227. In 1864 Denmark, Prussia, and Austria announced that they would not visit vessels under convoy; Calvo, § 1219.

<sup>5</sup> France and Venezuela, 1843 (De Martens, Nouv. Rec. Gén. v. 171);

PART IV. more than once that the treaties entered into by the United  
 CHAP. X. States afford little clue to the views entertained in that  
 country; and on this point, as usually, English and American  
 writers and judges are fully in accord<sup>1</sup>. On the continent  
 of Europe, Germany, Austria, Spain, and Italy, in addition  
 to the Baltic powers and France, provide by their naval  
 regulations that the declaration of a convoying officer shall  
 be accepted.

Continental publicists are almost unanimous in maintaining  
 the exemption from visit of convoyed ships, not only as to  
 be advocated in principle, but as an established rule of law<sup>2</sup>.  
 That it has any pretension to be so is evidently inadmissible;  
 the assertion of it, and the practice, which have been described  
 are insufficient both in kind and degree to impose a duty  
 on dissenting states; and it cannot even be granted that the  
 doctrine possesses a reasonable theoretic basis. The only  
 basis indeed on which it seems to be founded is one which, in  
 declaring that the immunity from visit possessed by a ship  
 of war extends itself to the vessels in her company, begs  
 the whole question at issue<sup>3</sup>. It is more to the purpose

Ecuador, 1843 (ib. 409); New Grenada, 1844 (id. vii. 620); Chile, 1846 (id.  
 xvi. i. 10); Guatemala, 1848 (id. xii. 10); Honduras, 1856 (id. xvi. ii. 154);  
 United States and Sweden, 1816 (Nouv. Rec. iv. 258); Columbia, 1824 (id.  
 vi. 1000); Central America, 1825 (ib. 835); Brazil, 1828 (id. ix. 63); Mexico,  
 1831 (id. x. 340); Chile, 1832 (id. xi. 446); Venezuela, 1836 (id. xiii. 560);  
 Ecuador, 1839 (ib. 23); New Grenada, 1848 (Nouv. Rec. Gén. xiii. 663);  
 Guatemala, 1849 (ib. 304); San Salvador, 1850 (id. xv. 77); Peru, 1870  
 (Nouv. Rec. Gén. 2<sup>e</sup> Serie, i. 103); and Italy, 1871 (Archives de Droit Int.  
 1874, p. 136).

<sup>1</sup> Kent, Comm. lect. vii; Wheaton, Elem. pt. iv. chap. iii. § 29; Dana,  
 notes to Wheaton, § 526; Woolsey, Introduction to International Law, § 191.  
 Justice Story says, 'The law deems the sailing under convoy as an act *per se*  
 inconsistent with neutrality, as a premeditated attempt to oppose, if practicable,  
 the right of search, and therefore attributes to such preliminary act the full  
 effect of actual resistance.' The *Nereide*, ix Cranch, 440. The judgment of  
 Lord Stowell in the case of the *Maria*, i Rob. 340, is the recognised expression  
 of English doctrine.

<sup>2</sup> Bluntschli (§ 824-5) puts forward a doctrine as law which amounts to the  
 compromise of 1801 between Russia and Great Britain, construed favourably  
 for the neutrals.

<sup>3</sup> Ortolan, ii. 271.

to consider whether the privilege claimed by neutrals is fairly consistent with the interests of belligerents, and whether it would be likely in the long run to be to the advantage of neutral states themselves. It is argued that the commander of a vessel of war in charge of a convoy represents his government, that his affirmation pledges the faith of his nation, and that the belligerent has a stronger guarantee in being assured by him that the vessels in company are not engaged in any illicit traffic, than in examining for himself papers which may be fraudulent. But unless the neutral state is to exercise a minuteness of supervision over every ship issuing from her ports which would probably be impossible, and which it is not proposed to exact from her, the affirmation of the officer commanding the convoy can mean no more than that the ostensible papers of the vessels belonging to it do not show on their face any improper destination or object. Assuming that the officials at the ports of the neutral country are always able and willing to prevent any vessel laden with contraband from joining a convoy, the officer in command must still be unable to affirm of the vessels under his charge, that no one is engaged in carrying enemy's despatches or military passengers of importance; that none have an ultimate intention of breaking a blockade; or, if the belligerent nation acts on the doctrine that enemy's goods in a neutral vessel can be seized, that none of the property in course of transport in fact belongs to the enemy. If the doctrine is accepted, it would not infrequently happen that instances in which protection of a convoy has been abused will come afterwards to the knowledge of the belligerent to whose injury they have occurred; he will believe that the cases of which he knows are but a fraction of those which actually exist, he will regard the conduct of the neutral state with suspicion; complaints and misunderstandings will arise, and the existence of peace itself may be endangered. It cannot be too often repeated that the more a state places itself between the individual

PART IV.  
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Whether exemption of convoyed vessels from visit is expedient.

PART IV. and the belligerent, the greater must be the number of international disputes. And belligerents will always look upon convoys with doubt, from the mere fact that their innocence cannot be tested. The neutrality of neutral nations is not always honest, and the temptation to pervert the uses of a convoy has not always been resisted; rightly or wrongly it will be thought, as it was thought in England during the French wars, that 'if there is any truth in the reasons stated for searching merchantmen not convoyed, it must be admitted that the presence of the convoy ship, so far from being a sufficient pledge of their innocence, is rather a circumstance of suspicion. If a neutral nation fits out ships of war, and escorts all its trading vessels with them, we have a right to conclude that she is deviating from her neutrality<sup>1</sup>.'

It cannot but be concluded that the principle of the exemption of convoyed ships from visit is not embraced in authoritative international law, and that while its adoption into it would be injurious to belligerents, it would not be permanently to the advantage of neutrals.

Formalities of visit.

§ 273. The exercise of the right of visit is necessarily attended with formalities, the regulation of which has been attempted in a large number of treaties without any definite arrangement as to the details having received universal assent<sup>2</sup>. Usually the visiting ship, on arriving within

<sup>1</sup> Lord Brougham (1807); Works, vol. viii. 388.

<sup>2</sup> The following article of the Treaty of the Pyrenees (1659) has served as the model for a great number of more modern conventions: 'Les navires d'Espagne, pour éviter tout désordre, n'approcheront pas plus près les français que de la portée du canon, et pourront envoyer leur petite barque ou chaloupe à bord des navires français, et faire entrer dedans deux ou trois hommes seulement, à qui seront montrés les passeports par le maître du navire français, par lesquels il puisse apparoir, non seulement de la charge, mais aussi du lieu de sa demeure et résidence, et du nom tant du maître ou patron que du navire même, afin que, par ces deux moyens, on puisse connaître s'il porte des marchandises de contrebande, et qu'il apparaisse suffisamment tant de la qualité du dit navire que de son maître ou patron; auxquels passeports on devra donner entière foi et créance.' Dumont, vi. ii. 264. Few treaties prescribing formalities of visit have been made between European states during

reasonable distance, hoists its colours and fires a gun, called the semonce or affirming gun, by which the neutral vessel is warned to bring to, but the ceremony, though customary, is not thought to be essential either in English or American practice<sup>1</sup>. The belligerent vessel then also brings to at a distance which, in the absence of treaties, is unfixed by custom, but which has been often settled with needless precision. The natural distrust of armed vessels which was entertained, when privateers of not always irreproachable conduct were employed in every war, and when pirates were not unknown, dictated stipulations enjoining on the cruiser to remain beyond cannon shot; but the reason for so inconvenient a regulation has disappeared, and the modern treaties which repeat the provision, as well as those which permit approach to half range, are alike open to the criticism of M. Ortolan, that 'they have not been drawn by sailors<sup>2</sup>.' The visit itself is effected by sending an officer on board the merchantman<sup>3</sup>, who in the first instance examines the documents by which the character of the vessel, the nature of her cargo, and the ports from and to which she is sailing, are shown. According to the English practice these documents ought generally to be,—

1. The register, specifying the owner, name of ship, size, and other particulars necessary for identification.
2. The passport (sea letter) issued by the neutral state.

the present century, and in all the cases of such treaties concluded within the last forty years one of the parties has been a Central or South American State.

<sup>1</sup> The *Marianna Flora*, xi Wheaton, 48.

<sup>2</sup> *Dip. de la Mer*, ii. 256. Negrin (p. 229, note) takes the same view.

<sup>3</sup> Modern usage allows the master of the merchantman to be summoned with his papers on board the cruiser (*The Eleanor*, ii Wheaton, 262), and the regulations of the German and Danish navies order that this shall be done (*Rev. de Droit, Int.* x. 214, 238); but Pistoye and Duverdy (i. 237) think the practice open to objections both from the point of view of the belligerent and of the neutral. The former may be easily deceived by false papers; and the latter is exposed to the less obvious risk that the documents necessary to prove the legitimacy of his adventure may be detained.



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3. The muster roll, containing the names, &c. of the crew.
4. The log-book.
5. The charter party, or statement of the contract under which the ship is let for the current voyage.
6. Invoices containing the particulars of the cargo.
7. The duplicate of the bill of lading, or acknowledgment from the master of the receipt of the goods specified therein, and promise to deliver them to the consignee or his order.

And the information contained in these papers is in the main required by the practice of other nations<sup>1</sup>.

If the inspection of the documents reveals no ground of suspicion, and the visiting officer has no serious anterior reason for suspecting fraud, the vessel is allowed to continue its voyage without further investigation; if otherwise, it is subjected to an examination of such minuteness as may be necessary<sup>2</sup>.

Capture

§ 274. Capture of a vessel takes place—

1. When visit and search are resisted.
2. When it is either clear, or there is fair ground for suspecting, upon evidence obtained by the visit, that the vessel is engaged in an illicit act or that its cargo is liable to confiscation.
3. When from the absence of essential papers the true character of the ship cannot be ascertained.

on ground  
of resist-  
ance,

§ 275. The right of capture on the ground of resistance to visit, and that of subsequent confiscation, flow necessarily from the lawfulness of visit, and give rise to no question. If the belligerent when visiting is within the rights possessed by a state in amity with the country to which the neutral

<sup>1</sup> For the papers which may be expected to be found on board the vessels of the more important maritime nations see Appendix iii.

<sup>2</sup> The absence of due conformity to the forms of visit, and of attention to the evidences of nationality, prescribed by the regulations of the state to which the visiting ship belongs, is not sufficient to invalidate the capture if it be proved before the prize court that due cause of capture was in fact existing. *La Tri-Swiatitela*, Dalloy, *Jurisp. Gén.* Ann. 1855, iii. 73.

ship belongs, the neutral master is guilty of an unprovoked aggression in using force to prevent the visit from being accomplished, and the belligerent may consequently treat him as an enemy and confiscate his ship. PART IV.  
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The only point arising out of this cause of seizure which requires to be noticed is the effect of resistance upon cargo when made by the master of the vessel, or upon vessel and cargo together when made by the officer commanding a convoy. The English and American courts, which alone seem to have had an opportunity of deciding in the matter, are agreed in looking upon the resistance of a neutral master as involving goods in the fate of the vessel in which they are loaded, and of an officer in charge as condemning the whole property placed under his protection. ‘I stand with confidence,’ said Lord Stowell, ‘upon all fair principles of reason, upon the distinct authority of Vattel, upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down, that by the law of nations as now understood a deliberate and continued resistance to search, on the part of a neutral vessel, to a lawful cruiser, is followed by the legal consequences of confiscation <sup>1</sup>.’

But the rules accepted in the two countries differ with regard to property placed in charge of a belligerent. Lord Stowell, in administering the law as understood in England, held that the immunity of neutral goods on board a belligerent merchantman is not affected by the resistance of the master; for while on the one hand he has a full right to save from capture the belligerent property in his charge, on the other the neutral cannot be assumed to have calculated or intended that visit should be resisted <sup>2</sup>. ‘But if the neutral puts his goods on board a ship of force which he has every reason to presume will be defended against the enemy by that force, the case then becomes very different. He betrays an

<sup>1</sup> *The Maria*, 1 Rob. 377.

<sup>2</sup> *The Catherina Elizabeth*, v Rob. 232.

PART IV. intention to resist visitation and search, and so far he adheres to the belligerent. . . . If a party acts in association with a hostile force, and relies on that force for protection, he is *pro hac vice* to be considered as an enemy<sup>1</sup>.

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Doctrine of  
the American  
courts.

The American courts carry their application of the principle that neutral goods in enemy's vessels are free to a further point, and hold that the right of neutrals to carry on their trade in such vessels is not impaired by the fact that the latter are armed. According to Chief Justice Marshall, 'the object of the neutral is the transportation of his goods. His connection with the vessel which transports them is the same whether that vessel be armed or unarmed. The act of arming is not his,—it is the act of a party who has a right to do so. He meddles not with the armament nor with the war;' and the belligerent suffers no injury from his act, for 'if the property be neutral, what mischief is done by its escaping a search?'

Controversy between  
Denmark and  
the United  
States.

The same doctrine was applied by the government of the United States in a controversy with Denmark which sprung out of the use of English convoys by American vessels trading to the Baltic during war between Denmark and Great Britain. Large numbers of such vessels were in the habit, after receiving cargoes of naval stores in Russia, of assembling on the coasts of Sweden, where they met British men of war, by which they were protected until they were out of danger. As the nature of the cargoes exposed the

<sup>1</sup> The *Fanny*, 1 Dodson, 448. Mr. Justice Story, dissenting from the majority of the Supreme Court, argued strenuously in favour of the view taken by the English courts. 'It is necessarily known to the convoyed ships that the belligerent is bound to resist, and will resist until overcome by superior force. It is impossible therefore to join such convoy without an intention to receive the protection of a belligerent force in such manner and under such circumstances as the belligerent may choose to apply it. To render the convoy an effectual protection it is necessary to interchange signals and instructions, to communicate information, and to watch the approach of an enemy. The neutral solicitously aids and co-operates in all these important transactions, and thus far manifestly sides with the belligerent, and performs as to him a meritorious service.' The *Nereide*, ix Cranch, 441.

intention with which this practice was carried on to extreme suspicion, the Danish government issued an ordinance in 1810, declaring all neutral vessels availing themselves of belligerent convoy to be good prize. Several stragglers were captured, without actual resistance being made, and were condemned by the Danish courts, it being considered that an intention to resist had been sufficiently manifested by joining the convoy. It was argued by the American government that though a neutral may not escape from visit by the use of force or fraud, he may use any means of simple avoidance; it was apparently implied that the act of joining a convoy, being open, could not be fraudulent; and it was urged that an actual participation in resistance must be required to involve the neutral in its consequences. A mere intention to resist, not carried into effect, had never, it was said, in the case of a single ship been considered to entail the penalty of confiscation; and the two cases in no way so differed as to call for the application of a different principle. The Danish government on its part seems in effect to have maintained that not only is a settled intention to resist equivalent to actual resistance, but that he who causes himself to be protected 'by an enemy's convoy ranges himself on the side of the protector, and thus puts himself in opposition to the enemy of the protector, and evidently renounces the advantage attached to the character of a friend to him against whom he seeks protection.'

The United States, after a negotiation extending over twenty years, succeeded in obtaining a treaty, under which Denmark, while expressly declaring that its concession was not to be looked upon as a precedent, agreed to pay a sum *en bloc* by way of indemnity to the American subjects whose property had been seized<sup>1</sup>.

<sup>1</sup> Wheaton, Elem. pt. iv. chap. iii. § 32. Mr. Wheaton was the negotiator of the treaty, and is naturally prejudiced in favour of the doctrine which he was employed in pressing; but his annotator, Mr. Lawrence, appears to take a different view. Woolsey (Introd. § 193), Dana (note to Wheaton, § 535),

PART IV. § 276. The occasions on which a neutral vessel may be  
 CHAP. X. seized for illicit acts affecting itself, or because its cargo is  
 Capture for liable to confiscation, have for the most part been already  
 fraudulent specified<sup>1</sup>. But there still remains to be noticed, as affecting  
 acts. it with penalties, a class of fraudulent or ambiguous acts of  
 the owner or master, consisting in—

1. The possession of false documents.
2. The destruction or concealment of papers.

False docu- That a vessel is furnished with double or false documents  
 ments. is invariably held to be a sufficient reason for bringing her in  
 for adjudication; and according to Russian practice, at any  
 rate, a false passport, and in Spanish practice double papers of  
 any kind, entail confiscation of both ship and cargo; but  
 generally falsity of papers is regarded with leniency, and is  
 only considered to be noxious when there is reason to believe  
 that the fictitious documents were framed in order to deceive  
 the capturing belligerent, and that they would therefore  
 fraudulently oust the rights of the captors, if admitted as  
 genuine. The ground of this leniency is that, apart from  
 indications that they are directed against the interests of a  
 particular belligerent, they are as likely to have been pro-  
 vided as a safeguard against the enemy of the captor as  
 against the captor himself<sup>2</sup>.

Spoliation The destruction or 'spoliation' of papers, and even, though  
 of papers. to a less degree, their concealment, is theoretically an offence  
 of the most serious nature, the presumption being that it is

and Kent (Comm. lect. vii.) assert the English doctrine as unquestionable. Ortolan (ii. 275) adopts the same opinion, subject only to the reservation that if a neutral vessel meeting a belligerent convoy attaches itself to it, her conduct may be looked upon as an innocent ruse to escape the inconvenience of a visit, and not as implying an intention to resist. The contrary doctrine has no better defender than M. Hautefeuille, tit. xi. chap. iii. sect. 2.

<sup>1</sup> Comp. ante, pp. 587, 590, 613, 623, 626.

<sup>2</sup> Halleck, ii. 299; *The Eliza and Katy*, vi Rob. 192; *The St. Nicholas*, i Wheaton, 417; *Rev. de Droit. Int.* x. 611; Negrin, 251.

By English practice captors are allowed expenses when they have been misled by false papers into capturing an innocent vessel, the papers being intended to deceive the enemy. *The Sarah*, iii Rob. 330.

effected for the purpose of fraudulently suppressing evidence which if produced would cause condemnation. The French Regulations of 1704, repeated in 1744 and 1778, declared to be good prize all vessels, with their cargoes, on simple proof of the fact that papers had been destroyed, irrespective of what the papers were; but the severity of the rule has been tempered in practice, it being commonly required that the destroyed papers should be proved to be such as in themselves to entail confiscation<sup>1</sup>. In England and America a milder practice is in use. Spoliation or concealment of papers, 'if all the other circumstances are clear,' only affects the neutral with loss of freight; but it is a cause of grave suspicion, and may shut out the guilty person from any indulgence of the court, as for example, from permission to bring further proof if further proof be necessary. If the circumstances are not clear, if for example spoliation takes place when the capturing vessel is in sight, or at the time of capture, or subsequently to it without the destroyed papers having been seen by the captor, further proof would probably be shut out as of course, the natural inference from the circumstances being that they have been destroyed because their contents were compromising<sup>2</sup>.

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§ 277. In the absence of proof that he has rendered himself liable to penalties, a neutral has the benefit of those presumptions in his favour which are afforded by his professed neutrality. His goods are *primâ facie* free from liability to

Duties of  
a captor.

<sup>1</sup> Pistoye et Duverdy, ii. 73, citing the case of *La Fortune*. But in the case of the *Apollos*, the rule was pressed with extreme rigour. A prize was wrecked at the entrance of the port of Ostend; at the moment when it grounded the captain snatched the ship's papers from the prize-master, and on getting to shore at once lodged them with the *juge de paix*. They established the neutrality of the ship and cargo, and there was no reason to believe that any of the number had been abstracted, but it being possible that in the confusion some might have been destroyed, the penalty of proved destruction was inflicted. Pistoye et Duverdy, ii. 81.

<sup>2</sup> The *Rising Sun*, ii Rob. 106; The *Hunter*, i Dodson, 487; *Livingston v. The Maryland Ins. Cy.*, vii Cranch, 544; The *Commercen*, i Wheaton, 386; The *Pizarro*, ii Wheaton, 241; The *Johanna Emilie*, Spinks, 22.

PART IV. seizure and confiscation. If then they are seized, it is for  
 CHAP. X. the captor, before confiscating them or inflicting a penalty of any kind on the neutral, to show that the acts of the latter have been such as to give him a right to do so. Property therefore in neutral goods or vessels which are seized by a belligerent does not vest upon the completion of a capture. It remains in the neutral until judgment of confiscation has been pronounced by the competent courts after due legal investigation. The courts before which the question is brought whether capture of neutral property has been effected for sufficient cause are instituted by the belligerent and sit in his territory; but the law which they administer is international law.

Such being the position of neutral property previously to adjudication, and such being the conditions under which adjudication takes place, a captor lies under the following duties:—

1. He must conduct his visit and capture with as much regard for persons and for the safety of property as the necessities of the case may allow; and though he may detain persons in order to secure their presence as witnesses, he cannot treat them as prisoners of war, nor can he exact any pledges with respect to their conduct in the future as a condition of their release. If he maltreats them the courts will decree damage to the injured parties<sup>1</sup>.

2. He must bring in the captured property for adjudication, and must use all reasonable speed in doing so. In cases of improper delay, demurrage is given to the claimant, and costs and expenses are refused to the captor. It follows as of course from this rule,—which itself is a necessary consequence of the fact that property in neutral ships and goods

<sup>1</sup> *The Anna Maria*, ii Wheaton, 332; *The Vrow Johanna*, iv Rob. 351; *The San Juan Baptista*, v Rob. 23; Lord Lyons to Earl Russell, and Mr. Seward to Mr. Welles, Parl. Papers, 1862, lxii. No. i. 119. By the German naval regulations members of the crew detained as witnesses are kept at the cost of the state until decision of the cause, after which they are handed over to the consul of their state to be sent home. *Rev. de Droit Int.* x. 239.

is not transferred by capture,—that a neutral vessel must not be destroyed; and the principle that destruction involves compensation was laid down in the broadest manner by Lord Stowell; where a ship is neutral, he said, ‘the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor’s own state; to the neutral it can only be justified under any such circumstances by a full restitution in value.’ It is the English practice to give costs and damages as well; to destroy a neutral ship is a punishable wrong; if it cannot be brought in for adjudication, it can and ought to be released<sup>1</sup>.

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3. In the course of bringing in, the captor must exercise due care to preserve the captured vessel and goods from loss or damage; and he is liable to penalties for negligence. For loss by fortune of the sea he is of course not liable<sup>2</sup>.

<sup>1</sup> *The Zee Star*, iv Rob. 71; *The Felicity*, ii Dodson, 383; *The Leucade*, Spinks, 221.

<sup>2</sup> Restitution in value or damages are given for loss or injury received by a vessel in consequence of a refusal of nautical assistance by the captor. *Der Mohr*, iv Rob. 314; *Die Fire Damer*, v Rob. 357.

The principle that a captor must not wilfully expose property to danger of capture by the other belligerent by bringing it to England, when he may resort to Admiralty courts in the colonies, was admitted in the *Nicholas and Jan*, i Rob. 97, though in the particular case the court decided against the claimant of restitution in value on the ground that due discretion had not been exceeded.



## CHAPTER XI.

### NEUTRAL PERSONS AND PROPERTY WITHIN BELLIGERENT JURISDICTION.

PART IV. § 278. As a state possesses jurisdiction, within the limits  
CHAP. XI. which have been indicated, over the persons and property of  
General position of neutral persons and property within belligerent jurisdiction. foreigners found upon its land and waters, the person and property of neutral individuals in a belligerent state is in principle subjected to such exceptional measures of jurisdiction and to such exceptional taxation and seizure for the use of the state as the existence of hostilities may render necessary, provided that no further burden is placed upon foreigners than is imposed upon subjects.

So also, as neutral individuals within an enemy state are subject to the jurisdiction of that enemy and are so far intimately associated with him that they cannot be separated from him for many purposes, they and their property are as a general principle exposed to the same extent as non-combatant enemy subjects to the consequences of hostilities. Neutral persons are placed in the same way as subjects of the state under the temporary jurisdiction of the foreign occupant, acts of disobedience are punishable in like manner, and the belligerent is not obliged to show more consideration to them in the conduct of his operations than he exhibits towards other inhabitants of the country,—he need not, for example, give them an opportunity of withdrawing from a besieged town before bombardment, which he does not accord to the population at large. Their property is not exempt from contributions and requisitions.

The principle is clear and indisputable; and no objection can be made to its effect upon persons, or upon property which is associated either permanently or for a considerable time with the belligerent territory. But it might perhaps have been expected, and it might certainly have been hoped, that its application would not have been extended to neutral property passingly within a belligerent state. The right to use, or even when necessary to destroy, such property is however recognised by writers, under the name of the right of angary<sup>1</sup>; its exercise is guarded against in a certain number of treaties<sup>2</sup>; and when not so guarded against, it has occasionally been put in practice in recent times with the acquiescence of neutral states. In a large number of treaties the neutral owner is to some extent protected from loss by a stipulation that he shall be compensated<sup>3</sup>; and it is possible that a right to compensation might be generally held to exist apart from treaties.

The most recent cases of the exercise of the right of angary occurred during the Franco-German War of 1870-1. The German authorities in Alsace, for example, seized for military use between six and seven hundred railway carriages belonging to the Central Swiss Railway, and a considerable quantity of Austrian rolling stock, and appear to have kept the carriages, trucks, etc. so seized for some time. Another instance which occurred nearly at the same moment attracted

<sup>1</sup> In the end of last century De Martens said (*Précis*, § 269, ed. 1789) that 'it is doubtful whether the common law of nations gives to a belligerent, except in cases of extreme necessity, the right of seizing neutral vessels lying in his ports at the outbreak of war, in order to meet the requirements of his fleet, on payment of their services. Usage has introduced the exercise of this right, but a number of treaties have abolished it.' Azuni, on the other hand, treats it as a right existing in all cases of 'necessity or public utility,' and declares any vessel attempting to avoid it to be liable to confiscation. *Droit Maritime*, ch. iii. art. 5.

Of recent writers Sir R. Phillimore (iii. § xxix), and M. Heffter (§ 150), unwillingly, and M. Bluntschli (§ 795 bis) less reservedly, recognise the right.

<sup>2</sup> Stipulations forbidding the seizure of ships or merchandise in times both of peace and war for public purposes were not uncommon in the end of last century, but they do not appear after the early years of the present century.

<sup>3</sup> These treaties are all made with Central or South American States.

PART IV. a good deal of attention, and is of interest as showing  
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 — distinct acquiescence on the part of the government of the neutral subjects affected. Some English vessels were seized by the German general in command at Rouen, and sunk in the Seine at Duclair in order to prevent French gun-boats from running up the river, and from barring the German corps operating on its two banks from communication with each other. The German commanders appear to have endeavoured in the first instance to make an agreement with the captains of the vessels to sink the latter after payment of their value and after taking out their cargoes. The captains having refused to enter into any such agreement, their refusal was by a strange perversion of ideas 'considered to be an infraction of neutrality,' and the vessels were sunk by the unnecessarily violent method of firing upon them while some at least of the members of the crews appear to have been on board. The English government did not dispute the right of the Germans to act in a general sense in the manner which they had adopted, and notwithstanding the objectionable details of their conduct, it confined itself to a demand that the persons whose property had been destroyed should receive the compensation to which a despatch of Count Bismarck had already admitted their right. Count Bismarck on his side, in writing upon the matter, claimed that 'the measure in question, however exceptional in its nature, did not overstep the bounds of international warlike usage. The report shows that a pressing danger was at hand, and every other means of meeting it was wanting; the case was therefore one of necessity, which even in time of peace may render the employment or destruction of foreign property admissible under the reservation of indemnification <sup>1</sup>.'

<sup>1</sup> D'Angeberg, Nos. 914, 920, 957; State Papers, 1871, lxxxi. c. 250. A considerable portion of the French expedition to Egypt in 1798 seems to have been carried in neutral vessels seized in the ports of France, De Martens, Rec. vii. 163; and compare an order of Napoleon for the seizure for that purpose of some vessels in Marseilles (Corresp. iv. 101).

## APPENDIX I.

### FORMATION OF THE CONCEPTION OF INTERNATIONAL LAW.

THE state of things which presented itself in Europe for a considerable time before international law came into existence was as follows:—

1. Such material restraint as was supplied at an earlier period over the greater part of civilised Europe by the feudal relation, and over much of it by the superiority of the Empire, had disappeared, and such moderating influence as had been exercised by the Church had also disappeared. Influences, in other words, which, whatever their material power, had at one time deeply affected the imagination, had died away.

2. No means existed of setting up any authority of a like external nature competent to maintain international order; and no habit of reference to a formulated moral standard, independently of external authority, had grown up.

3. Rules of conduct were becoming daily more necessary, through the increasing intercourse between both states themselves and the subjects of states, and through the wider area over which the relations of states were continually spreading.

Under such circumstances it was natural that a craving should be felt for the discovery of a rule of international conduct, capable of impressing itself on the mind with something of the force of law. That such a craving was generally felt there are many indications, and in fact, without its

existence as a powerful motive among the European peoples at large, international law could obviously not have obtained recognition. The only distinct attempts to satisfy it were however made by legal writers; and it was by them, as the medium through which the ideas found expression which were latent in the general mind, that international law was placed upon its original speculative basis. To understand how that basis came to be adopted, therefore, it is only necessary to examine the writers by whom the advent of law was prepared.

Two lines of thought, differing in their origin, and at first in their practical bearing, contributed to the foundation of international law. One, associated with Catholicism, was that of the jurists who followed in the steps of the theologico-legal school of the middle ages; the other, associated with Protestantism, was that of writers who were compelled by religious separation to take an independent starting-point. The former from the commencement applied their legal theories to the solution of international questions; the latter were at first busied with the foundations of municipal law, and only turned their attention to international subjects at a late period.

The circumstances which called into existence a school of Catholic writers inclined to take into consideration international matters arose out of the position of Spain in the sixteenth century. The extent of the Spanish dominions in Europe, the attitude of the country as a great combative state engaged in almost constant hostilities, and the novelty of its situation in face of the semi-civilised races of America, early forced upon the attention of its people a crowd of international problems, especially those connected with war. At the same time a school of jurists existed ready to hand. It was a period during which the Spanish mind was active in many directions, and it was peculiarly active in the department of law. The writers of the time moreover, though cramped by scholastic forms and habits of thought, were

acute, comprehensive, and above all warmly inspired with a love of political justice. They were thus in many respects well fitted to undertake the extension of general legal ideas to a new class of facts.

The first result of the circumstances, and of the capacity to deal with them, which thus combined to direct the current of Spanish thought is found in the growth of doubts as to the conditions under which Indians might be legitimately subjugated. During the first years of American conquest it was unhesitatingly thought that the Pope possessed authority to convey to his grantee the sovereignty of countries inhabited by infidels, and that the Indians, being barbarous, and therefore φύσει δοῦλοι, were unable themselves to be sovereign. But a lively controversy upon these points gradually arose, and in 1533 Franciscus à Victoria wrote two dissertations which mark an era in the history of international ethics. In the first he denied the validity of the title received from the Pope, he maintained the sovereign rights of the Indians, he declared that the Spaniards had no right of war upon them except for specific injuries to themselves or for violation of natural rights common to all mankind, and he placed international relations firmly upon the basis of equal rights as between communities in actual possession of independence<sup>1</sup>. His second dissertation, *De Jure Belli*, deals more with particular usages, but within its narrower scope it shows as distinctly a spirit of boldness and humanity, and as strong a tendency to refer custom to a touchstone of principle. Victoria was greatly in advance of the practice of his time. If it had not been so, much progress would have been made towards the establishment of international law. His importance consists partly in the fact that he was a teacher of recognised authority, and partly in the evidence which he affords that certain ideas were fermenting in men's minds. In giving expression to those ideas he stood by no means alone. Covarruvias and Soto display a temper as

<sup>1</sup> *Relect. de Indis.* sect. i; ii. § 1-7; iii. § 2-12.

liberal, though it happens that they touch more incidentally upon the subjects which border on international law<sup>1</sup>. The series is continued by Ayala, whose work upon the laws of war is instinct with the same principles. That it is somewhat harsher in details is probably due to the fact that it is a sort of military handbook. He wrote less for jurists than for soldiers, and the greater part of his treatise is occupied with martial law and with questions of policy and strategy<sup>2</sup>. Suarez, the greatest of the Spanish theological jurists, is of much higher theoretical importance. He elevates a law of nature, originally ordained by God, but now immutable by him, into a standard to which mankind is bound to conform so far as its dictates can be read; and under its guidance he asserts the moral and practical necessity of a social tie between states. At the same time he clearly recognises that a wide field of relations exists in which the dictates of the law of nature are so uncertain that nations must be bound by arbitrary rules of custom<sup>3</sup>. The theory of which this is the outline was marked out more fully and decidedly by Suarez than by his predecessors, but they held it in common with him; and in separating natural and human laws from the law of God, as independent of it, though conforming to it within the range of their objects, they only followed in a path which had long before been pointed out by Aquinas<sup>4</sup>, and which led inevitably to the adoption of certain views as to

<sup>1</sup> Covarruvias, *Opera* (1554), tom. i. pars ii. § 10, *De Bello adversus Infideles*: Soto, *Comment. in Quart. Lib. Sent.* (1561), distinct. v. quaest. un. art. 10. Sir J. Mackintosh in speaking of Soto rightly says, 'It is hard for any man of the present age to conceive the praise which is due to the excellent monks who courageously asserted the rights of those whom they never saw against the prejudices of their order, the supposed interest of their religion, the ambition of their government, the avarice and pride of their countrymen, and the prevalent opinions of their time.' *Prog. of Ethical Philosophy*, sect. iii.

<sup>2</sup> *De Jure et Officiis Bellicis* (1581). Ayala was Judge-Advocate of the forces of Philip II in the Low Countries.

<sup>3</sup> *De Legibus et Deo Legislatore*, lib. i. c. 2, 5, 7, 19, 20. Suarez also touched in other places upon many special points of international conduct.

<sup>4</sup> *Prim. Sec. Quaest.* xc-c.

the right relations of states so soon as attention was directed to them. In themselves these views were identical with the rudimentary doctrines of the founders of international law. Nevertheless the series of early Spanish writers passed away without leaving any traces of their work, except in an indirect manner. After all they were incapable of being the originators of a law in obedience to which all Europe could unite. Their treatment of all questions was intimately, though unnecessarily, associated with a theologico-legal thought and method. Liberal as they seemed to be, there always came a point at which they chose to subordinate speculation and action to religion; and when Suarez wrote that 'the discussion of all laws, by reason of their divine origin, belongs properly to the theological faculty,' he declared his incompetence to plant international law on the only ground where it could live, upon that, namely, where all faiths could meet. The true reason for which the Spanish jurists are important lies in the indirect effect which they produced through the influence exercised by them over their Protestant successors,—an influence which the latter were little anxious to acknowledge, but the magnitude of which, outside the one fundamental question of the theological or extra-theological basis of law, it would be very easy to underrate.

The earliest of the Protestant writers were Melancthon, Oldendorp, and Hemming<sup>1</sup>. In the term 'natural law,' which had been borrowed from the Romans and misunderstood, they found a name which impressed the imagination, but which represented no very definite ideas, and was therefore capable of receiving a conveniently plastic application. Upon this they seized as offering the means of setting up a standard of right which should be independent of theology. Law was founded upon natural law. At first natural law was identified with the positive law of God as laid down

<sup>1</sup> Melancthon, *Ethicae Doctrinae Elementa* (1538); Oldendorp, *Isagoge Juris Naturalis* (1539); Hemming, *De Lege Naturae Methodus Apodictica* (1562).



in the Decalogue. Although therefore it was dissociated from the dogmas of sects, its separation from theology was still very imperfect. In the course of the sixteenth century the conception of natural law became however secularised, and it consequently stood ready before the beginning of the seventeenth century to receive an application to international relations which its students had until then been too much occupied with more pressing questions to make.

This application was effected by Albericus Gentilis, who judged international usages by the test of a law of nature, which he separated fully from theology by regarding it, apart from immediate reference to a divine command, as the simple expression of natural reason<sup>1</sup>. If in applying his ethical conception he was unable to retain the breadth with which he had formed it, and identified the dictates of natural reason with the *jus gentium* of the Romans, he only shared an opinion which was universal in his day, and it is therefore not altogether easy to account sufficiently for the insignificance of the impression which he made, and for the completeness with which he was soon forgotten. Not only in conceiving nations to be governed by a non-theological natural law, but to a great degree also in details, he anticipated the doctrine of Grotius, and though the treatise of the latter is both more thorough and more systematic, and by being expressed more in the language of a moralist than of a lawyer is more taking in its form, it may be suspected that the chief reason for the solitary position which has been given to the author as the father of international law is that the labours of Gentilis were somewhat premature. The necessity of an authoritative international rule was felt by the better minds, and a habit of taking a legal view of international relations was rapidly forming itself, but it required the horrors of the Thirty Years' War to turn a slowly developing desire into a universal and urgent demand for law.

<sup>1</sup> De Jure Belli (1588), *passim*, but esp. c. 1 and 3.

Five and thirty years later Grotius published his three books *De Jure Belli et Pacis*, in which, while recognising that states are entirely independent of each other and of any superior, he endeavours to find a necessary law for them by assuming that aggregations of human beings ought to be subject to the same laws as would exist between individuals in the absence of organised societies, and by building up a system of such laws upon an analysis of human character. It can hardly be said that the work is distinctly original either in its object or its particular doctrines. The notion of independence as a juridical idea was already latent in the argument of Victoria, and it gathered strength during the remainder of the sixteenth century; every predecessor of Grotius who touched upon questions of international right attempted to solve them by reference to a law intended to represent views common to all men irrespectively of their special institutions; and by Winkler and Gentilis this law had been disengaged from religion. What Grotius succeeded in doing, and what had not been done before, was to use all these elements at once, and in fairly due relation to each other, for the formation of a coherent system.

According to the theory of Grotius, man in his state of nature is endowed with a dominant social appetite, which requires for its due gratification to be subjected to control. He has the means of providing control in the power of forming general principles for the direction of conduct which is enjoyed by his reason; and he ought to be governed by the latter and by his social disposition, because it is in respect of these qualities that he is superior to animals. There is therefore an obligatory rule or natural law, which consists in the principles enunciated by reason for the guidance of the social appetite. So necessary is this law that it is binding upon us apart from the divine command; and though under certain circumstances its injunctions must be looked upon as those of God himself, they would be equally binding in the absence of a divine ruler, who indeed in making them has divested

himself of the power to over-ride them<sup>1</sup>. The function of this law of nature is to prescribe the more general rules of practice; it orders, for example, abstention from the seizure of what belongs to others, restoration of it when it comes into our possession, fulfilment of promises, reparation of injuries, and the infliction of punishment for crime; but in many cases these and like precepts are incapable of being directly applied; it becomes therefore the business of a law, called voluntary or positive law, which is imposed by the divine or by human will, to adjust the principles of natural law to details, and to supplement them in matters which they do not touch. Primarily the being subjected to law is the individual man, but as civil societies are made up of an aggregation of such beings, they are themselves subjected to like laws with them. The rules governing the intercourse of states are thus partly to be deduced from natural law, and partly are composed of positive human law. The authority of a rule claiming to belong to the former portion may either be proved *à priori* by its necessary congruence with the rational and social nature of man, or *à posteriori* by the fact that it is accepted among all, or among the more civilised nations as being a part of natural law. The evidence of the imposition of the latter portion is to be found in its recognition as obligatory by all or by a great number of nations; and the source of its authority, as of that exercised by all positive law, is the tacit or express consent of the whole or a majority of the members of the society affected by it<sup>2</sup>.

The success of this theory and of the rules which were

<sup>1</sup> Natural law is binding 'etsi daremus, quod sine summo scelere dari nequit, deum non esse aut non curari ab eo negotia humana.' Prolegomena, § 11. It has been seen that Suarez also asserted the law of nature to be now immutable. The same doctrine was strongly expressed by Lessius, a Belgian Jesuit, in 1605: 'Juris naturalis rectitudo, supposita existentia naturae humanae, non pendet ex aliqua libera ordinatione dei vel hominis, sed ex ipsa natura rerum. Itaque sicut naturae conditio est immutabilis, ita quoque lex naturalis est immutabilis.' Quoted in Kaltenborn, *Die Vorläufer des Hugo Grotius*, 155, note.

<sup>2</sup> De Jure Belli et Pacis, Prolegomena and lib. i. cap. i.

based upon it was immediate and complete. It was recognised as giving form and voice to ideas which had long been growing in a confused manner in men's minds;—as expressing those ideas on the one hand, and as investing them with coherence on the other. It satisfied at once the practical needs of statesmen and their subjects, and the speculative requirements of jurists. To the former it gave reason for an expectation, which otherwise could scarcely be felt, that the conduct of states to each other would be kept within some restraint; and to the latter it offered a theory which accommodated itself to the new facts of the world, and which reconciled with law that independence of states which had seemed to involve the destruction of all law. It was consequently at once accepted as the authoritative code of states; and though the inadequacy of its speculative foundation has since been seen, though the principles which it embodies have no longer the same relative importance as between themselves which they occupied in the mind of Grotius, and though its specific rules have almost all been developed or modified, international law has never fully emancipated itself from the authority of its founder, and his ideas have always retained an influence much in advance of their true value as a reflex of the particular phase of thought which came most naturally to the mind of Europe in his time, and was dictated by the circumstances then and previously existing.

## APPENDIX II.

### CONDITIONS OF THE NATIONALITY OF VESSELS FIXED BY THE LAWS OF THEIR RESPECTIVE COUNTRIES.

#### AUSTRIA.

Vessels are Austrian which belong to subjects of the state, and of which the captain and two-thirds of the crew are Austrian. It is immaterial whether they are or are not built within the empire.

#### BELGIUM.

Vessels are Belgian irrespectively of their place of construction and of the nationality of their captain and crew which

1. are wholly owned by Belgian subjects ; or  
are owned partly by Belgians and partly by foreigners resident elsewhere than in Belgium, provided that the interest of the latter is not greater than three-eighths of the value ;
2. have received a *lettre de mer*.

#### BRAZIL.

Vessels are Brazilian which are wholly owned by Brazilian subjects, or which belong to a navigation company, and of which the captain is Brazilian ; provided that if they are of foreign construction they have obtained naturalisation, for the grant of which a tax of thirty per cent. is levied ; and that, if sold within the territory of Brazil or of any foreign country other than that where they were

constructed, the consent of the consul of the state to which they belonged has been obtained.

#### CHILE.

Vessels are Chilean which belong to natural-born or naturalised Chilean subjects, or to foreigners who have been resident more than three years in the country and possess a house of trade or industry, provided that not more than two-thirds of the crew, among whom may be all the officers, are foreigners.

#### COLOMBIA.

It would seem that all vessels owned by Colombian subjects, either solely or jointly with foreigners, may claim to be registered as Colombian irrespectively of their place of construction and of the composition of their crews, and that vessels owned solely by foreigners may be nationalised.

#### DENMARK.

It is necessary for a ship to be Danish that it shall belong in part, or if it is engaged in the Iceland trade or fishing that it shall belong wholly, to a Danish subject. If it is of foreign construction it must be nationalised.

The officers and crew may be either Danish subjects or foreigners; but in all cases they must be registered, and must take an oath of fidelity to the king, and the officers, if foreigners, must have received burgher rights in some town of the kingdom.

#### FRANCE.

Vessels are French which

1. are registered as French;
2. belong to the extent of at least one-half of their value to French subjects;
3. have the names of their captain, officers, and at least three-fourths of the crew borne upon the inscription maritime;
4. and, if built abroad, have paid a duty of two francs per ton upon their nationalisation.

Whalers are so far excepted from the regulation governing the composition of the crew that the captain and one-half of the sailors may be foreigners.

#### GERMANY.

Vessels are German which belong exclusively to persons to whom the status of natural-born German subjects belongs under Art. 3 of the Federal Constitution, and which are registered as German.

#### GREAT BRITAIN.

Vessels are British which

1. are registered as British, or have received a provisional certificate good for six months from a British consul, or a pass with the force of a certificate enabling the vessel to go from one British port to another,
2. and belong to
  - i. natural-born British subjects;—‘provided that no natural-born British subject who has taken the oath of allegiance to any foreign sovereign or state shall be entitled to be such owner aforesaid, unless he has, subsequently to taking such last-mentioned oath, taken the oath of allegiance to Her Majesty, and is, and continues to be, during the whole period of his so being an owner, resident in some place within Her Majesty’s dominions, or if not so resident, member of a British factory, a partner in a house actually carrying on business in the United Kingdom, or in some other place within Her Majesty’s dominions.’
  - ii. ‘Persons made denizens by letters of denization, or naturalised by and pursuant to any act of the Imperial legislature, or by or pursuant to any act or ordinance of the proper legislative authority in any British possession; provided that such persons are and continue to be, during the whole period of their so being owners, resident in some place within Her

Majesty's dominions, or if not so resident, members of a British factory, or partners in a house actually carrying on business in the United Kingdom, or in some other place within Her Majesty's dominions, and have taken the oath of allegiance to Her Majesty subsequently to the period of their being so made denizens or naturalised.'

- iii. 'Bodies corporate established under, subject to the laws of, and having their principal place of business in, the United Kingdom or some British possession.'

#### GREECE.

Vessels are Greek which

- 1. are registered as Greek ;
- 2. are owned to the extent of at least one-half their value by Greek subjects, unless the foreign co-proprietor belongs to a state of which the law is more stringent in this respect than that of Greece, when the Greek government makes what conditions it chooses ;
- 3. have a Greek captain and officers, and a crew Greek to the extent of three-fourths of its number.

A vessel built abroad, if wholly owned by a Greek, may make her voyage as a Greek vessel, under a provisional pass, to the port at which her owner intends to register her.

#### ITALY.

Vessels are Italian which

- 1. belong wholly to Italians, or to persons domiciled in Italy at least ten years. An exception is made in the case of vessels belonging to a joint stock company, which can obtain nationalisation for its ships by making an Italian subject its representative ;
- 2. are commanded by an Italian captain and officers, and are manned by a crew of which at least three-fourths is Italian ; and which



3. if of foreign construction have obtained an act of nationality from the Minister of the Marine.

## NETHERLANDS.

A vessel is capable of being registered as Dutch if

1. it belongs in its entirety to inhabitants of the kingdom born there ;
2. it belongs to the extent of not more than three-eighths to foreign partners in a house of trade established in the kingdom, or to foreign subjects who have lived there for more than a year, provided that it belongs to the extent of the remaining five-eighths to such inhabitants born in the kingdom as above-mentioned ;
3. if built abroad, it has paid a nationalisation tax of four per cent. on its value.

## PERU.

Any vessel can be registered as Peruvian which belongs to one or more citizens of the Republic, of which the master is Peruvian by birth or naturalisation, and of which the crew is composed to the extent of at least one-fifth of Peruvian subjects.

## PORTUGAL.

A vessel, in order to be Portuguese, must

1. belong to a Portuguese subject or subjects, or to a company of which the majority of members are Portuguese, and which has its seat at Lisbon ;
2. be commanded by a Portuguese master, and be manned by a crew of which at least three-fourths are Portuguese ;
3. have been either built in Portugal, or captured and declared good prize, or have been imported by a Portuguese subject on payment of an importation duty.

## RUSSIA.

Vessels are Russian which belong wholly to Russian

subjects, of which the captain and at least half of the crew are Russian, and which, if of foreign build, belong to a member or to members of the first guild of merchants, and have received a patent authorising the use of the Russian flag.

**SPAIN.**

Vessels are Spanish which belong in their entirety to Spanish subjects, and which are registered as Spanish. Vessels bought abroad by Spanish subjects, which have not yet arrived at a port where they can be registered, are provisionally considered to be Spanish if they sail with papers delivered through the Spanish consul residing in the place of purchase.

**SWEDEN AND NORWAY.**

Vessels are Swedish or Norwegian if they belong in their entirety to Swedish or Norwegian subjects domiciled in the two kingdoms respectively, if they have been registered as Swedish or Norwegian, and if the captain is of the nationality claimed for the vessel. Vessels bought abroad by Swedish subjects are allowed, on application to the Board of Commerce, to sail for a year without being registered.

**UNITED STATES.**

Vessels are national which

1. belong wholly to one or more citizens of the United States;
2. have either been built in the United States, or have been captured in war and declared to be good prize, or have been confiscated for breach of the federal laws, or have been bought after shipwreck and repaired to the extent of two-thirds of their value by American citizens;
3. are manned to the extent of two-thirds of the crew by Americans, and are commanded by American officers.

## APPENDIX III.

### PAPERS CARRIED BY VESSELS IN EVIDENCE OF THEIR NATIONALITY, AND OTHER PAPERS WHICH OUGHT TO BE FOUND ON BOARD.

#### AUSTRIA.

Papers evidencing nationality:—

Patente sovrana (royal license).

Scontrino ministeriale (certificate of registry).

Other papers carried :—

Giornale di navigazione (official log-book).

Scartafaccio, giornale di navigazione cotidiano (ship's log-book).

Ruolo dell' equipaggio (muster roll).

Bill of health.

Charter-party, if the vessel is chartered.

#### BRAZIL.

Paper evidencing nationality :—

Passport purporting to be issued as to a national vessel.

#### DENMARK.

Evidence of nationality:—

Certificate of nationality and registry.

The letters D. E. (Dansk Eiendom) burnt into the main-beam in the after part of the main hatchway.

Papers carried, other than that above mentioned :—

Royal passport, in Latin, with translation, available only for the voyage for which it is issued, unless renewed by attestation.

Certificate of ownership.

Build-brief (certificate of build).

Admeasurement-brief.

Burgher-brief (certificate that the master has burgher rights in some town of the kingdom).

Muster-roll.

Charter-party, if the vessel is chartered.

#### FRANCE.

Papers evidencing nationality:—

L'acte de propriété de navire.

L'acte de francisation.

Le rôle d'équipage.

Other papers which must be carried under the provisions of the Code de Commerce:—

Les connaissements et chartes-parties.

Les procès-verbaux de visite.

Les acquits de paiement ou à caution.

#### GERMANY.

Paper evidencing nationality:—

Certificate of nationality.

Other papers carried:—

Messbrief (certificate of measurement).

Beilbrief (builder's certificate).

See-pass (sailing license).

Journall (ship's log-book).

Muster-rolle (muster-roll).

Charter-party, if the vessel is chartered.

#### GREAT BRITAIN.

Paper evidencing nationality:—

Certificate of registry, or provisional certificate granted by a consul resident in a foreign country to a vessel brought there. The provisional certificate is good for six months from the date of issue. A pass granted to a vessel before registration, enabling her to go from

one port to another within the British dominions, has also the force of a certificate.

Other papers carried :—

Official log-book.

Ship's log-book.

Shipping articles.

Muster-roll.

Bill of health.

Charter-party, if the vessel is chartered.

#### ITALY.

Paper evidencing nationality :—

Scontrino ministeriale (certificate of registry).

Other papers carried :—

Patente sovrana (royal license).

Giornale di navigazione (official log-book).

Scartafaccio, giornale di navigazione cotidiano (ship's log-book).

Ruolo dell' equipaggio (muster-roll).

Bill of health.

Charter-party, if the vessel is chartered.

#### NETHERLANDS.

Zeebrief (sailing license).

Bijlbrief (certificate of ownership).

Meetbrief (certificate of tonnage).

Journal (ship's log-book).

Monster-rol (muster-roll).

Charter-party, if the vessel is chartered.

#### NORWAY.

Paper evidencing nationality :—

Nationalitetsbreviis (certificate of nationality).

Other papers carried :—

Bülbrev (certificate of build).

Maalebrev (certificate of measurement).

N.B. The bülbrev and the maalebrev need not be carried by vessels bought in foreign ports for two years after purchase.

Journale (ship's log-book).  
 Charter-party, if the vessel is chartered.  
 Mandskabliste (muster-roll).

## PORTUGAL.

Papers with which a vessel must be provided :—

Pasaporte de navegacion.  
 Acta de propiedad del buque.  
 Rol.  
 Conocimientos.  
 Recibos de fletes y despacho.  
 A copy of the Code of Commerce.

## RUSSIA.

Evidence of nationality :—

Patent authorising the use of the Russian flag.  
 The fact that the master and half the crew are Russian.  
 N.B. The patent is not conclusive evidence in itself,  
 because it can be granted, though it is not commonly  
 granted, to foreign ships.

Papers which must be carried by Russian ships :—

The patent above mentioned.  
 Beilbrief (builder's certificate).  
 Custom-house passport.

Other papers carried :—

Ship's log-book.  
 Muster-roll.  
 Charter-party, if the vessel is chartered.

## SPAIN.

Paper evidencing nationality :—

La patente ó pasaporte de navegacion.

Other papers carried :—

El rol del equipage y lista de pasajeros.  
 Testimonio de la escritura de propiedad de la nave.  
 Contrato de fletamento.  
 Conocimientos, facturas y guias de la carga.

**SWEDEN.**

A passport from a chief magistrate or commissioner of customs.

Bilbref (builder's certificate).

Mätebref (certificate of measurement).

Fribref (certificate of registry).

Journalen (ship's log-book).

Folkpass or sjemansrubla (muster-roll).

Charter-party, if the vessel is chartered.

**UNITED STATES.**

Paper evidencing nationality:—

Certificate of registry.

Other papers carried:—

Sea-letter or certificate of ownership.

Ship's log-book.

Charter-party, if the vessel is chartered.

Shipping articles.

Muster-roll.

Bill of health.

## APPENDIX IV.

### CONDITIONS UPON WHICH NATURALISATION CAN BE ACQUIRED IN DIFFERENT STATES.

#### ARGENTINE CONFEDERATION.

All persons who have lived for two years continuously in the Confederation become naturalised by making a declaration before a judge of their desire to become Argentine citizens. The executive government has the right of abridging the required term of residence in the case of persons who have rendered services to the republic, among whom are counted teachers of all kinds, and persons who marry Argentine women.

#### AUSTRIA-HUNGARY.

It being required by Austrian law that every Austrian subject shall be a member of a commune, and it being impossible to compel a commune to receive a member against its will, every foreigner applying for naturalisation must secure, as a condition precedent to his application being entertained, that a commune shall be ready to receive him. This condition satisfied, the executive government can bestow naturalisation upon any foreigner who has taken up his residence in the state. Naturalisation is also acquired as of course by the acceptance of a situation in the public service, and by an uninterrupted residence of ten years, without having during that time incurred punishment for crime.

The Hungarian law is similar.



**BELGIUM.**

In Belgium naturalisation is of two kinds, the great and the ordinary. The great naturalisation can be conferred for eminent services to the state, upon the children of persons receiving it, and upon children of aliens born in Belgium who have omitted to declare themselves Belgian on attaining their majority; its effect is to invest the naturalised person with the whole of the civil and political rights of a subject. The ordinary naturalisation confers civil rights only; it may be granted to any one who has completed his twenty-first year, and who has resided five years in the country. The children of persons receiving it, born after its reception, have full political rights.

Both kinds of naturalisation are accomplished by an act of the legislature.

**BRAZIL.**

In Brazil it is nominally required as a condition of naturalisation that a foreigner receiving it shall be twenty-one years old and that he shall have lived two years in the country. The latter part of the condition however disappears in a cloud of exceptional cases in which it is dispensed with. All persons 'remarkable by their talents' or who have 'deserved well of the country,' e.g. any one who has made an invention or created an industry, any one who has made a campaign in the Brazilian service, any one who has married a Brazilian woman or adopted a Brazilian child, may acquire the rights of citizenship at any moment by making a declaration before the municipal authorities of their place of residence. All colonists also arriving in Brazil, whether at their own expense or at that of the government, may obtain naturalisation irrespective of length of residence.

**CHILE.**

In Chile, foreigners who are engaged in trade, or possessed or other property, and who if they have married a Brazilian have lived three years in the republic, or if they

are married to some person other than a Chilean and have a family have lived there six years, or who in other cases have lived there ten years, may acquire a Chilean nationality by declaring before the municipality of the place where they reside that they intend to establish themselves permanently in the country. The legislature may accord naturalisation as a special favour.

#### COLOMBIA.

All foreigners who have lived more than one year in the country and have an intention to remain may obtain letters of naturalisation on application to the superior authorities of the state in which they are resident.

#### DENMARK.

The full naturalisation of a foreigner is effected by a special act of the legislature; but it would seem that the Danish government considers that an alien obtains all the rights of a subject (except the political rights arising out of the form of government) and takes upon himself all the duties (except the duties correlative to the political rights mentioned) by the acquisition of *borgerskat*, i.e. the status of a burgher, through the reception of a *borgherbrev*, i.e. the freedom of a borough.

#### FRANCE.

Naturalisation is granted in France by *lettres de déclaration de naturalité* to aliens who are of more than twenty-one years of age, who have received permission to establish themselves in the country (which permission is understood to be given when their names and domicile are registered in the Ministry of the Interior in compliance with the police regulations affecting all residents), and who have in fact resided in it for three years. The period of three years may be reduced to one in favour of foreigners who have rendered important services to the state or who have introduced useful inventions or have formed considerable industrial or trading establishments.

**GERMANY.**

A person may apply to be naturalised in Germany on showing,—

1. that he is free to change his nationality under the laws of his country of origin, or, if he is a minor, that he has received permission from his father or guardian ;
2. that he is leading a respectable life ;
3. that he is domiciled in Germany ;
4. that he has means of livelihood.

Naturalisation is conferred by the superior administrative authorities of the several states, and is granted or refused at their discretion.

**GREAT BRITAIN.**

Naturalisation is acquired by receiving a certificate of naturalisation from one of the Secretaries of State. Upon application being made, such certificate may be granted to, but also in the discretion of the Secretary of State may be withheld from, any alien who has resided in the United Kingdom for a term of not less than five years, or has been in the service of the Crown for a term of not less than five years, and intends, when naturalised, either to reside in the United Kingdom or to serve under the Crown.

Naturalisation in Great Britain does not extend to India and the Colonies ; naturalisation in which conversely does not extend to Great Britain, and is regulated by a variety of local laws.

**GREECE.**

A foreigner becomes naturalised in Greece by receiving a certificate from the nomarch of the district in which he resides. He acquires a right to this certificate by inscribing his name in the registers of the demos where he lives, and by a subsequent residence, not necessarily continuous, of two years if he is of Greek race, or of three years if he is not so.

## ITALY.

Naturalisation is acquired either by law or by royal decree. When granted in the latter manner the decree must be registered by the proper civil authority of the place in which the naturalised person intends to live, and an oath of allegiance must be taken.

## MEXICO.

Naturalisation is acquired,—

1. through grant of letters of naturalisation by the President of the Republic. Such letters may be conferred upon any one showing that he has the means of living by a profession or industrial employment ;
2. by operation of law ; i. e. when a person accepts a public employment reserved to citizens, or marries a Mexican wife and declares his intention of becoming a citizen, or when he fixes himself in the country as a colonist under certain colonisation laws. Naturalisation by operation of law is evidenced by letters declaratory.

## NETHERLANDS.

Naturalisation is conferred by a special law, it being the usual but not necessary condition that the person desiring naturalisation shall have lived six consecutive years on Dutch soil.

## NORWAY.

Naturalisation may be conferred by an act of the Storting, and is also obtained by a foreigner who having resided in the country for ten years elects to be Norwegian.

## PERU.

All foreigners are reckoned citizens by naturalisation who, being of the age of twenty-one years, are resident in the country and in the exercise of some employment, industry, or profession, and who have caused themselves to be entered in the civic register.

**PORTUGAL.**

Naturalisation is granted at the discretion of the government to foreigners, who

1. have attained their majority by the law both of their country of origin, and of Portugal,
2. have means of subsistence or are able to work, and
3. have lived a year in the country. This last condition is not exacted from persons who have married a Portuguese wife, or who are partially of Portuguese blood.

**ROUMANIA.**

Christian foreigners can be naturalised by an act of the legislature, if after requesting naturalisation by petition addressed to the Prince, they live ten years in the country, and show their usefulness to the country. Dispensation from the ten years' residence may be given on the ground of important industrial or other services to the country; and persons of Roumanian race can be naturalised immediately on demand if they are freed from their allegiance of origin. The cessation of the incapacity of non-Christians to be naturalised, which was imposed by the Treaty of Berlin, has not yet been worked out.

**RUSSIA.**

Naturalisation is acquired in Russia by taking an oath of allegiance, leave to take which is requested from the Minister of the Interior, who may grant or refuse the petition as he chooses. As a general rule persons can only petition to be naturalised when they have been domiciled for five years in Russia, but in special cases the term may be shortened, and all persons in the military or civil service and ecclesiastics of foreign persuasions are admitted without having passed through a period of domicile. Except in the case of persons distinguished in art, in trade, or in some other pursuit, the period required for the acquisition of domicile begins to run only from the date of a notice

of intention to become domiciled which the foreigner must give to the governor of the province in which he is resident.

#### SPAIN.

Naturalisation in Spain is of four different kinds, each of which is associated with a different degree of rights and obligations. Of these kinds three are conferred by the Cortes, and one by the executive authority. The acquisition of all appears to be unshackled by any requirement that preliminary conditions shall be fulfilled.

Persons who have acquired what is called 'vecindad,' that is to say, persons who have established themselves in the country, who have married a Spanish wife, or who hold real property, or have exercised some trade or profession with the permission of the superior civil authority of the province, may also become Spaniards by causing themselves to be inscribed in the register of their commune, and renouncing their former nationality.

#### SWEDEN.

A foreigner after three years' residence can petition for naturalisation, which is granted if an inquiry into his character and circumstances gives favourable results, and on the condition that he renounces his nationality of origin.

#### SWITZERLAND.

A foreigner acquires Swiss nationality by becoming a citizen of a canton. In order to become a citizen of a canton he must receive permission, by his own request or at the instance of the canton, from the Federal Council, and the Federal Council can only give permission to persons who have lived in Switzerland for two years, and whose 'relations with their state of origin are such that their admission to Swiss nationality will not be injurious to the Confederation.'

#### UNITED STATES.

By the Act of April 14, 1802, which is the law now applicable in ordinary cases,—

‘ Any alien, being a free white person, may be admitted to become a citizen of the United States or any of them on the following conditions :

- ‘ 1. That he shall have declared on oath or affirmation, before the supreme, superior, district, or circuit court of some one of the States or of the territorial districts of the United States, or a circuit or district court of the United States, three years at least before his admission, that it was *boná fide* his intention to become a citizen of the United States, and to renounce for ever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatever, and particularly, by name, the prince, potentate, state, or sovereignty whereof such aliens may, at the time, be a citizen or subject.
- ‘ 2. That he shall, at the time of his application to be admitted, declare on oath or affirmation, before some one of the courts as aforesaid, that he will support the Constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly, by name, the prince, potentate, state, or sovereignty whereof he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court.
- ‘ 3. That the court admitting such alien shall be satisfied that he has resided within the United States five years at least, and within the state or territory where such court is at the time held, one year at least; and it shall further appear to their satisfaction that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same, provided

that the oath of the applicant shall in no case be allowed to prove his residence.

‘ 4. That he shall renounce any title of nobility.’

URUGUAY.

In Uruguay all persons are considered to be citizens who

1. have seen actual service during war as officers of the military or naval forces of the state ;
2. are married to Uruguayan women, provided that they are in a trade or profession, that they possess personal or real property to an undefined amount, and that they take an oath to the constitution ;
3. are married to foreign women, and fulfil some one only of the foregoing conditions, provided that they have been three years in the country ;
4. if unmarried, have been four years in the country ;
5. have received naturalisation by a special vote of the legislature as a reward for distinguished services.



## APPENDIX V.

### CONSULAR CONVENTION, SIGNED AT WASHINGTON JULY 11, 1870, BETWEEN AUSTRIA-HUNGARY AND THE UNITED STATES.

THE President of the United States of America, and His Majesty the Emperor of Austria, King of Bohemia etc. and Apostolic King of Hungary, animated by the desire to define in a comprehensive and precise manner the reciprocal rights, privileges and immunities of the Consuls-General, Consuls, Vice-Consuls and Consular Agents (their Chancellors and Secretaries) of the United States of America and of the Austro-Hungarian Monarchy, and to determine their duties and their respective sphere of action, have agreed upon the conclusion of a Consular Convention, and for that purpose have appointed their respective Plenipotentiaries, namely:

The President of the United States of America:

Hamilton Fish, Secretary of State of the United States;  
And His Majesty the Emperor of Austria, Apostolic King of Hungary:

Charles Baron von Lederer, Knight of the Imperial and Royal Order of Leopold, and His Majesty's Envoy Extraordinary and Minister Plenipotentiary in the United States of America,

who after communicating to each other their full powers, found in good and due form, have agreed upon the following Articles:

Art. I. Each of the High Contracting Parties shall be at

liberty to establish Consuls-General, Consuls, Vice-Consuls or Consular Agents at the ports and places of trade of the other party, except those where it may not be convenient to recognise such officers, but this exception shall not apply to one of the High Contracting Parties, without also applying to every other Power.

Consuls-General, Consuls, and other Consular Officers appointed and taking office according to the provisions of this Article in one or the other of the two countries shall be free to exercise the right accorded them by the present Convention throughout the whole of the district for which they may be respectively appointed.

The said functionaries shall be admitted and recognised respectively upon presenting their credentials in accordance with the rules and formalities established in their respective countries.

The exequatur required for the free exercise of their official duties shall be delivered to them free of charge, and upon exhibiting such exequatur they shall be admitted at once and without interference by the authorities, federal or state, judicial or executive, of the ports, cities and places of their residence and district, to the enjoyment of the prerogatives reciprocally granted.

Art. II. The Consuls-General, Consuls, Vice-Consuls and Consular Agents, their Chancellors, and other Consular Officers, if they are citizens of the State which appoints them, shall be exempt from military billetings, from service in the military or the national guard and other duties of the same nature, and from all direct and personal taxation, whether federal, state or municipal, provided they be not owners of real estate and neither carry on trade nor any industrial business.

If however they are not citizens of the State which appoints them or if they are citizens of the State in which they reside, or if they own property, or engage in any business there that is taxed under any laws of the country,

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Art. VI. In the event of incapacity, absence or death of Consuls-General, Consuls, Vice-Consuls, their Consular Pupils, Chancellors or Secretaries, whose official character may have been previously made known to the respective authorities in the United States or in the Austro-Hungarian Empire, shall be admitted at once to the temporary exercise of the Consular functions, and they shall, for the duration of it, enjoy all the immunities, rights and privileges conferred upon them by this Convention.

Art. VII. Consuls-General and Consuls shall have the power to appoint Vice-Consuls and Consular Agents in the cities, ports and towns within their Consular districts, subject however to the approbation of the Government of the country where they reside.

These Vice-Consuls and Consular Agents may be selected indiscriminately from among citizens of the two countries or from foreigners, and they shall be furnished with a Commission issued by the appointing Consul, under whose orders they are to be placed.

They shall enjoy the privileges and liberties stipulated in this Convention.

To Vice-Consuls and to Consular Agents who are not citizens of the State which appoints them, the privileges and immunities specified in Article II shall not extend.

Art. VIII. Consuls-General, Consuls, Vice-Consuls or Consular Agents of the two countries may, in the exercise of their duties, apply to the authorities within their district, whether federal or local, judicial or executive, in the event of any infraction of the treaties and conventions between the two countries; also for the purpose of protecting the rights of their countrymen.

Should the said authorities fail to take due notice of their application, they shall be at liberty, in the absence of any diplomatic representative of their country, to apply to the Government of the country where they reside.

Art. IX. Consuls-General, Consuls, Vice-Consuls or Con-

sular Agents of the two countries, also their Chancellors, shall have the right to take at their office, at the residence of the parties, or on board ship, the depositions of the Captains and crews of vessels of their own nation, of passengers on board of them, of merchants, or any other citizens of their own country.

They shall have the power also to receive and verify, conformably to the laws and regulations of their country:

1st. Wills and bequests of their countrymen, and all such acts and contracts between their countrymen as are intended to be drawn up in an authentic form and verified.

2nd. Any and all acts of agreement entered upon between citizens of their own country and inhabitants of the country where they reside.

All such acts of agreement and other instruments, and also copies thereof, when duly authenticated by such Consul-General, Consul, Vice-Consul, or Consular Agent under his official seals, shall be received in Courts of Justice as legal documents or as authenticated copies, as the case may be, and shall have the same force and effect as if drawn up by competent public officers of one or the other of the two countries.

Consuls-General, Consuls, Vice-Consuls or Consular Agents of the respective countries shall have the power to translate and legalise all documents issued by the authorities or functionaries of their own country, and such papers shall have the same force and effect in the country where the aforesaid officers reside as if drawn up by sworn interpreters.

Art. X. Consuls-General, Consuls, Vice-Consuls or Consular Agents shall be at liberty to go on board the vessels of their nation admitted to entry, either in person or by proxy, and to examine the Captain and crew, to look into the register of the ship, to receive declarations with reference to their voyage, their destination, and the incidents of the voyage, also to draw up manifests, lists of freight, to assist in dispatching their vessels, and finally to accompany

the said Captains or crews before the Courts and before the administrative authorities, in order to act as their interpreters or agents in their business transactions or applications of any kind.

The judicial authorities and Custom House officials shall in no case proceed to the examination or search of merchant vessels without previous notice to the Consular authority of the nation to which the said vessels belong, in order to enable them to be present.

They shall also give due notice to Consuls, Vice-Consuls or Consular Agents in order to enable them to be present at any depositions or statements to be made in Courts of law, or before local magistrates, by Captains or persons composing the crew, thus to prevent errors or false interpretations which might impede the correct administration of justice.

The notice to Consuls, Vice-Consuls or Consular Agents shall name the hour fixed for such proceedings, and upon the non-appearance of the said officers or their representatives, the case shall be proceeded with in their absence.

Art. XI. Consuls, Vice-Consuls or Consular Agents shall have exclusive charge of the internal order of the merchant vessels of their nation. They shall have therefore the exclusive power to take cognizance of and to settle all differences which may arise at sea or in port between Captains, Officers and crews in reference to wages and the execution of mutual contracts, subject in each case to the laws of their own nation.

The local authorities shall in no way interfere, except in cases where the differences on board ship are of a nature to disturb the peace and public order in port or on shore, or when persons other than the officers and crew of the vessel are parties to the disturbance.

Except as aforesaid, the local authorities shall confine themselves to the rendering of forcible assistance if required by the Consuls, Vice-Consuls or Consular Agents, and shall

cause the arrest, temporary imprisonment and removal on board his own vessel of every person whose name is found on the muster rolls or register of the ship or list of the crew.

Art. XII. Consuls-General, Consuls, Vice-Consuls or Consular Agents shall have the power to cause the arrest of all sailors or all other persons belonging to the crews of vessels of their nation who may be guilty of having deserted on the respective territories of the High Contracting Powers, and to have them sent on board or back to their native country.

To that end they shall make a written application to the competent local authority, supporting it by the exhibition of the ship's register and list of the crew, or else, should the vessel have sailed previously, by producing an authenticated copy of these documents, showing that the persons claimed really do belong to the ship's crew.

Upon such request the surrender of the deserter shall not be refused.

Every aid and assistance shall moreover be granted to the said Consular authorities for the detection and arrest of deserters, and the latter shall be taken to the prisons of the country and there detained at the request and expense of the Consular authority, until there may be an opportunity for sending them away.

The duration of this imprisonment shall not exceed the term of three months, at the expiration of which time, and upon three days' notice to the Consul, the prisoner shall be set free and he shall not be liable to rearrest for the same cause.

Should however the deserter have committed on shore an indictable offence, the local authorities shall be free to postpone his extradition until due sentence shall have been passed and executed.

The High Contracting Parties agree that seamen, or other individuals forming part of the ship's crew, who are citizens

of the country in which the desertion took place, shall not be affected by the provisions of this Article.

Art. XIII. In all cases where no other agreement to the contrary exists between owners, freighters and insurers, all damages suffered at sea by the vessels of the two countries, whether they enter the respective ports voluntarily or by stress of weather, shall be settled by the Consuls-General, Consuls, Vice-Consuls or Consular Agents of their respective nation, provided no interests of citizens of the country where the said functionaries reside, nor of citizens of a third power, are concerned.

In that case, and in the absence of a friendly compromise between all parties interested, the adjudication shall take place under supervision of the local authorities.

Art. XIV. In the event of a vessel belonging to the Government, or owned by a citizen of one of the two Contracting States, being wrecked or cast on shore upon the coast of the other, the local authorities shall inform the Consuls-General, Consuls, Vice-Consuls or Consular Agents of the district of the occurrence, or if such Consular Agency does not exist, they shall communicate with the Consul-General, Consul, Vice-Consul or Consular Agent of the nearest district.

All proceedings relative to the salvage of American vessels wrecked or cast on shore in Austro-Hungarian waters, shall be directed by the United States Consuls-General, Consuls, Vice-Consuls or Consular Agents, also all proceedings relative to the salvage of Austro-Hungarian vessels, wrecked or cast on shore in American waters, shall be directed by Austro-Hungarian Consuls-General, Consuls, Vice-Consuls or Consular Agents.

An interference of the local authorities in the two countries shall take place for the purpose only of assisting the Consular authorities in maintaining order and protecting the rights of salvors not belonging to the crew, also for enforcing the regulations relative to the import or export of the merchandise saved.



In the absence and until the arrival of the Consuls-General, Consuls, Vice-Consuls or Consular Agents or their duly appointed delegates, the local authorities shall take all the necessary measures for the protection of persons and preservation of the property saved from the wreck.

No charges shall be made for the interference of the local authorities in such cases, except for expenses incurred through salvage and the preservation of property saved, also for those expenses which, under similar circumstances, vessels belonging to the country where the wreck happens would have to incur.

In case of a doubt concerning the nationality of the wrecks, the local authorities shall have exclusively the management and execution of the provisions laid down in the present Article.

The High Contracting Parties also agree that all merchandise and goods not destined for consumption in the country in which the wreck takes place shall be free of all duties.

Art. XV. Consuls-General, Consuls, Vice-Consuls and Consular Agents, also Consular Pupils, Chancellors and Consular Officers shall enjoy in the two countries all the liberties, prerogatives, immunities and privileges granted to functionaries of the same class of the most favoured nation.

Art. XVI. In case of the death of a citizen of the United States in the Austrian-Hungarian Monarchy, or of a citizen of the Austrian-Hungarian Monarchy in the United States, without having any known heirs or testamentary executors by him appointed, the competent local authorities shall inform the Consuls or Consular Agents of the State, to which the deceased belongs, of the circumstance, in order that the necessary information may be immediately forwarded to the parties interested.

Art. XVII. The present Convention shall remain in force for the space of ten years from the date of the exchange of the ratifications, which shall be made in conformity with the

respective Constitutions of the two countries, and exchanged at Washington, within the period of ten (10) months, or sooner, if possible.

In case neither of the Contracting Parties gives notice before the expiration of the said term of its intention not to renew this Convention, it shall remain in force a year longer, and so on from year to year, until the expiration of a year from the day on which one of the parties shall have given such notice.

In testimony whereof the respective Plenipotentiaries have signed this Convention and hereunto affixed their respective seals.

Done, in duplicate, at Washington, the eleventh day of July in the year of our Lord one thousand eight hundred and seventy.

HAMILTON FISH.

LEDERER.

## APPENDIX VI.

### CONVENTION SIGNED AT GENEVA, AUGUST 22, 1864, FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED IN ARMIES IN THE FIELD.

Art. I. Les ambulances et les hôpitaux militaires seront reconnus neutres, et, comme tels, protégés et respectés par les belligérants aussi longtemps, qu'il s'y trouvera des malades ou des blessés.

La neutralité cesserait, si ces ambulances ou ces hôpitaux étaient gardés par une force militaire.

Art. II. Le personnel des hôpitaux et des ambulances, comprenant l'intendance, les services de santé, d'administration, de transport des blessés, ainsi que les aumôniers, participera au bénéfice de la neutralité lorsqu'il fonctionnera, et tant qu'il restera des blessés à relever ou à secourir.

Art. III. Les personnes désignées dans l'Article précédent pourront, même après l'occupation par l'ennemi, continuer à remplir leurs fonctions dans l'hôpital ou l'ambulance qu'elles desservent, ou se retirer pour rejoindre le corps auquel elles appartiennent.

Dans ces circonstances, lorsque ces personnes cesseront leurs fonctions, elles seront remises aux avant-postes ennemis, par les soins de l'armée occupante.

Art. IV. Le matériel des hôpitaux militaires demeurant soumis aux lois de la guerre, les personnes attachées à ces hôpitaux ne pourront, en se retirant, emporter que les objets, qui sont leur propriété particulière.

Dans les mêmes circonstances, au contraire, l'ambulance conservera son matériel.

Art. V. Les habitants du pays qui porteront secours aux blessés seront respectés, et demeureront libres. Les Généraux des Puissances belligérantes auront pour mission de prévenir les habitants de l'appel fait à leur humanité, et de la neutralité qui en sera la conséquence.

Tout blessé recueilli et soigné dans une maison y servira de sauvegarde. L'habitant qui aura recueilli chez lui des blessés sera dispensé du logement des troupes, ainsi que d'une partie des contributions de guerre qui seraient imposées.

Art. VI. Les militaires blessés ou malades seront recueillis et soignés, à quelque nation qu'ils appartiendront.

Les Commandants en chef auront la faculté de remettre immédiatement aux avantpostes ennemis, les militaires blessés pendant le combat, lorsque les circonstances le permettront, et du consentement des deux partis.

Seront renvoyés dans leurs pays ceux qui, après guérison, seront reconnus incapables de servir.

Les autres pourront être également renvoyés, à la condition de ne pas reprendre les armes pendant la durée de la guerre.

Les évacuations, avec le personnel qui les dirige, seront couvertes par une neutralité absolue.

Art. VII. Un drapeau distinctif et uniforme sera adopté pour les hôpitaux, les ambulances, et les évacuations. Il devra être, en toute circonstance, accompagné du drapeau national.

Un brassard sera également admis pour le personnel neutralisé, mais la délivrance en sera laissée à l'autorité militaire.

Le drapeau et le brassard porteront croix rouge sur fond blanc.

Art. VIII. Les détails d'exécution de la présente Convention seront réglés par les Commandants-en-chef des armées belligérantes, d'après les instructions de leurs Gouvernements respectifs, et conformément aux principes généraux énoncés dans cette Convention.

Art. IX. Les Hautes Puissances Contractantes sont con-

venues de communiquer la présente Convention aux Gouvernements, qui n'ont pu envoyer des Plénipotentiaires à la Conférence internationale de Genève, en les invitant à y accéder ; le Protocole est à cet effet laissé ouvert.

*Additional Articles signed at Geneva the 20th October, 1868.*

Art. 1. Le personnel désigné dans l'article deux de la Convention continuera, après l'occupation par l'ennemi, à donner, dans la mesure des besoins, ses soins aux malades et aux blessés de l'ambulance ou de l'hôpital qu'il dessert.

Lorsqu'il demandera à se retirer, le commandant des troupes occupantes fixera le moment de ce départ, qu'il ne pourra toutefois différer que pour une courte durée en cas de nécessités militaires.

Art. 2. Des dispositions devront être prises par les Puissances belligérantes pour assurer au personnel neutralisé, tombé entre les mains de l'armée ennemie, la jouissance intégrale de son traitement.

Art. 3. Dans les conditions prévues par les articles un et quatre de la Convention, la dénomination d'ambulance s'applique aux hôpitaux de campagne et autres établissements temporaires qui suivent les troupes sur les champs de bataille pour y recevoir des malades et des blessés.

Art. 4. Conformément à l'esprit de l'article cinq de la Convention et aux réserves mentionnées au Protocole de 1864, il est expliqué que pour la répartition des charges relatives au logement de troupes et aux contributions de guerre, il ne sera tenu compte que dans la mesure de l'équité du zèle charitable déployé par les habitants.

Art. 5. Par extension de l'article six de la Convention, il est stipulé que sous la réserve des officiers dont la possession importerait au sort des armes, et dans les limites fixées par le deuxième paragraphe de cet article, les blessés tombés entre les mains de l'ennemi, lors même qu'ils ne seraient pas reconnus incapables de servir, devront être renvoyés dans leur pays après leur guérison, ou plus tôt si faire se peut, à la

condition toutefois de ne pas reprendre les armes pendant la durée de la guerre.

*Articles concernant la Marine.*

Art. 6. Les embarcations qui, à leurs risques et périls, pendant et après le combat, recueillent ou qui, ayant recueilli des naufragés ou des blessés, les portent à bord d'un navire soit neutre, soit hospitalier, jouiront jusqu'à l'accomplissement de leur mission de la part de neutralité que les circonstances du combat et la situation des navires en conflit permettront de leur appliquer.

L'appréciation de ces circonstances est confiée à l'humanité de tous les combattants.

Les naufragés et les blessés ainsi recueillis et sauvés ne pourront servir pendant la durée de la guerre.

Art. 7. Le personnel religieux, médical et hospitalier de tout bâtiment capturé, est déclaré neutre. Il emporte, en quittant le navire, les objets et les instruments de chirurgie qui sont sa propriété particulière.

Art. 8. Le personnel désigné dans l'article précédent doit continuer à remplir ses fonctions sur le bâtiment capturé, concourir aux évacuations de blessés faites par le vainqueur, puis il doit être libre de rejoindre son pays, conformément au second paragraphe du premier article additionnel ci-dessus.

Les stipulations du deuxième article additionnel ci-dessus sont applicables au traitement de ce personnel.

Art. 9. Les bâtiments hôpitaux militaires restent soumis aux lois de la guerre, en ce qui concerne leur matériel; ils deviennent la propriété du capteur, mais celui-ci, ne pourra les détourner de leur affection spéciale pendant la durée de la guerre.

Art. 10. Tout bâtiment de commerce, à quelque nation qu'il appartienne, chargé exclusivement de blessés et de malades dont il opère l'évacuation, est couvert par la neutralité; mais le fait seul de la visite, notifié sur le journal

du bord, par un croiseur ennemi, rend les blessés et les malades incapables de servir pendant la durée de la guerre. Le croiseur aura même le droit de mettre à bord un commissaire pour accompagner le convoi et vérifier ainsi la bonne foi de l'opération.

Si le bâtiment de commerce contenait en outre un chargement, la neutralité le couvrirait, encore pourvu, que ce chargement ne fût pas de nature à être confisqué par le belligérant.

Les belligérants conservent le droit d'interdire aux bâtiments neutralisés toute communication et toute direction, qu'ils jugeraient nuisibles au secret de leurs opérations.

Dans les cas urgents, des conventions particulières pourront être faites entre les commandants en chef pour neutraliser momentanément d'une manière spéciale les navires destinés à l'évacuation des blessés et des malades.

Art. 11. Les marins et les militaires embarqués, blessés ou malades, à quelque nation qu'ils appartiennent, seront protégés et soignés par les capteurs.

Leur repatriement est soumis aux prescriptions de l'article six de la Convention et de l'article cinq additionnel.

Art. 12. Le drapeau distinctif à joindre au pavillon national pour indiquer un navire ou une embarcation quelconque qui réclame le bénéfice de la neutralité, en vertu des principes de cette Convention, est le pavillon blanc à croix rouge.

Les belligérants exercent à cet égard toute vérification, qu'ils jugent nécessaire.

Les bâtiments hôpitaux militaires seront distingués par une peinture extérieure blanche avec batterie verte.

Art. 13. Les navires hospitaliers, équipés aux frais des sociétés de secours reconnues par les Gouvernements signataires de cette Convention, pourvus de commission émanée du Souverain qui aura donné l'autorisation expresse de leur armement, et d'un document de l'autorité maritime compétente, stipulant qu'ils ont été soumis à son contrôle pendant leur armement et à leur départ final, et qu'ils étaient alors unique-

ment appropriés au but de leur mission, seront considérés comme neutres ainsi que tout leur personnel.

Ils seront respectés et protégés par les belligérants.

Ils se feront reconnaître en hissant, avec leur pavillon national, le pavillon blanc à croix rouge. La marque distinctive de leur personnel dans l'exercice de ses fonctions sera un brassard aux mêmes couleurs ; leur peinture extérieure sera blanche avec batterie rouge.

Ces navires porteront secours et assistance aux blessés et aux naufragés des belligérants sans distinction de nationalité.

Ils ne devront gêner en aucune manière les mouvements des combattants.

Pendant et après le combat, ils agiront à leurs risques et périls.

Les belligérants auront sur eux le droit de contrôle et de visite ; ils pourront refuser leur concours, leur enjoindre de s'éloigner, et les détenir si la gravité des circonstances l'exigeait.

Les blessés et les naufragés recueillis par ces navires ne pourront être réclamés par aucun des combattants, et il leur sera imposé de ne pas servir pendant la durée de la guerre.

Art. 14. Dans les guerres maritimes, toute forte présomption, que l'un des belligérants profite du bénéfice de la neutralité dans un autre intérêt que celui des blessés et des malades, permet à l'autre belligérant, jusqu'à preuve du contraire, de suspendre la Convention à son égard.

Si cette présomption devient une certitude, la Convention peut même lui être dénoncée pour toute la durée de la guerre.

*Paragraph accepted by the signatories of the foregoing additional Articles as additional to Article 9.*

‘Toutefois, les navires impropres au combat que, pendant la paix, les Gouvernements auront officiellement déclaré être destinés à servir d'hôpitaux maritimes flottants, jouiront,



pendant la guerre, de la neutralité complète au matériel comme au personnel, pourvu que leur armement soit uniquement approprié à leur destination spéciale.'

*Paragraph proposed by the Russian government in substitution of the following portion of the 12th of the Additional Articles, viz., ' Les belligérants exercent à cet égard toute vérification, qu'ils jugent nécessaire,' and accepted in substitution of such portion by all the signatories of the Articles except Germany, France, and Italy, and except the Netherlands, which proposed to retain the original paragraph and to add to it the substitutory paragraph.*

'A l'exception des navires hospitaliers qui se distinguent par une peinture extérieure spéciale, tout bâtiment de guerre ou de commerce ne peut se servir du pavillon blanc à croix rouge que dans le cas où il en aurait reçu l'autorisation par suite d'une entente préalable des belligérants. En l'absence d'une pareille entente, le bénéfice de la neutralité n'est accordé qu'à ceux des navires, dont le pavillon neutre tel qu'il est établi pour les bâtiments hospitaliers a été hissé avant qu'ils ne fussent aperçus par l'ennemi.'

## APPENDIX VII.

EXTRACT FROM THE DECLARATION OF RUSSIA AS TO  
THE PRINCIPLES OF THE FIRST ARMED NEUTRALITY,  
ADDRESSED TO THE COURTS OF LONDON AND MADRID,  
JULY 28, 1780.

L'IMPÉRATRICE de toutes les Russies a cru être de sa justice d'exposer aux yeux de l'Europe les principes qu'elle va suivre, et qui sont propres à lever tout malentendu et ce qui pourrait y donner lieu. Elle le fait avec d'autant plus de confiance, qu'elle trouve consignés ces principes dans le droit primitif des peuples que toute nation est fondée à réclamer, et que les puissances belligérantes ne sauraient les invalider sans violer les lois de la neutralité et sans désavouer les maximes qu'elles ont adoptées, nommément dans différents traités et engagements publics. Ils se réduisent aux points qui suivent :—

1. Que les vaisseaux neutres puissent naviguer librement de port en port, et sur les côtes des nations en guerre.

2. Que les effets appartenants aux sujets des dites puissances en guerre soient libres sur les vaisseaux neutres, à l'exception des marchandises de contrebande.

3. Que l'Impératrice se tient quant à la fixation de celles-ci à ce qui est énoncé dans les Articles X et XI de son traité de commerce avec la Grande-Bretagne, en étendant ces obligations à toutes les puissances en guerre.

4. Que pour déterminer ce qui caractérise un port bloqué on n'accorde cette dénomination qu'à celui où il y a, par la

disposition de la puissance qui l'attaque avec des vaisseaux arrêtés et suffisamment proches, un danger évident d'entrer.

5. Que ces principes servent de règle dans les procédures et les jugements sur la légalité des prises.

Sa Majesté Impériale les manifestant, ne balance point de déclarer, que pour les maintenir, et afin de protéger l'honneur de son pavillon, la sûreté du commerce et de la navigation de ses sujets contre qui que ce soit, elle fait appareiller une partie considérable de ses forces maritimes. De Martens, Rec. iii. 159.

The Articles of the Treaty of Commerce between Great Britain and Russia, above alluded to, are as follows :—

Art. X. Il sera permis aux sujets des deux Hautes Parties contractantes d'aller, venir et commercer librement dans les états, avec lesquels l'une ou l'autre de ces parties se trouvera présentement ou à l'avenir en guerre, bien entendu qu'ils ne portent point de munitions à l'ennemi; on en excepte néanmoins les places actuellement bloquées ou assiégées, tant par mer que par terre; en tout autre temps et à l'exception des munitions de guerre, les susdits sujets pourront transporter dans ces places toutes autres sortes de marchandises, ainsi que des passagers, sans le moindre empêchement.

Art. XI. Tous les canons, mortiers, armes-à-feu, pistolets, bombes, grenades, boulets, balles, fusils, pierres-à-feu, mèches, poudre, salpêtre, soufre, cuirasses, piques, épées, ceinturons, poches à cartouche, selles et brides, au delà de la quantité qui peut être nécessaire pour l'usage du vaisseau ou au delà de celle que doit avoir chaque homme servant sur le vaisseau et passager, seront réputés munitions ou provisions de guerre, et s'il s'en trouve, ils seront confisqués, selon les lois, comme contrebande ou effets prohibés; mais ni les vaisseaux, ni les passagers, ni les autres marchandises, qui s'y trouveront en même temps, ne seront point détenus, ni empêchés de continuer leur voyage. De Martens, Rec. i. 395.

*Extract from the Convention between the Emperor of Russia and the King of Sweden for the re-establishment of an Armed Neutrality, signed December 16, 1800.*

Art. II. Pour éviter toute équivoque et tout malentendu sur ce qui doit être qualifié de contrebande, sa Majesté le Roi de Suède et sa Majesté Impériale de toutes les Russies déclarent qu'elles ne reconnaissent pour telle que les objets suivants, savoir :—Canons, mortiers, armes-à-feu, pistolets, bombes, grenades, boulets, balles, fusils, pierres-à-feu, mèches, poudre, salpêtre, soufre, cuirasses, piques, épées, ceinturons, gibernes, selles et brides, en exceptant toutefois la quantité qui peut être nécessaire pour la défense du vaisseau et de ceux qui en composent l'équipage ; et tous les autres articles quelconques non désignés ici ne seront pas réputés munitions de guerre et navales, ni sujets à confiscation, et par conséquent passeront librement sans être assujettis à la moindre difficulté. Il est aussi convenu que le présent article ne portera aucun préjudice aux stipulations particulières des traités antérieurs avec les parties belligérantes, par lesquels des objets de pareil genre seraient réservés, prohibés ou permis.

Art. III. Tout ce qui peut être objet de contrebande étant ainsi déterminé et exclu du commerce des nations neutres, d'après le dispositif de l'article précédent, sa Majesté le Roi de Suède et sa Majesté Impériale de toutes les Russies entendent et veulent que tout autre trafic soit et reste parfaitement libre. Leurs Majestés, pour mettre sous une sauvegarde suffisante les principes généraux du droit naturel, dont la liberté de commerce et de la navigation, de même que les droits des peuples neutres sont une conséquence directe, ont résolu de ne les point laisser plus longtemps dépendre d'une interprétation arbitraire, suggérée par des intérêts isolés et momentanés. Dans cette vue elles sont convenus :—

1. Que tout vaisseau peut naviguer librement de port en port, et sur les côtes des nations en guerre.

2. Que les effets appartenants aux sujets des dites puissances

en guerre soient libres sur les vaisseaux neutres, à l'exception des marchandises de contrebande.

3. Que pour déterminer ce qui caractérise un port bloqué, on n'accorde cette dénomination qu'à celui, où il y a, par la disposition de la puissance qui l'attaque avec des vaisseaux arrêtés et suffisamment proches, un danger évident d'entrer, et que tout bâtiment naviguant vers un port bloqué ne pourra être regardé d'avoir contrevenu à la présente convention, que lorsqu'après avoir été averti par le commandant des blocus de l'état du port, il tâchera d'y pénétrer en employant la force ou la ruse.

4. Que les vaisseaux neutres ne peuvent être arrêtés que sur de justes causes et faits évidents, qu'ils soient jugés sans retard, que la procédure soit toujours uniforme, prompte et légale, et que chaque fois outre les dédommagements qu'on accorde à ceux qui ont fait des pertes, sans avoir été en contravention, il soit rendu une satisfaction complète pour l'insulte faite au pavillon de leurs Majestés.

5. Que la déclaration de l'officier commandant le vaisseau ou les vaisseaux de la marine royale ou impériale, qui accompagneront le convoi d'un ou de plusieurs bâtiments marchands, que son convoi n'a à bord aucune marchandise de contrebande, doit suffire pour qu'il n'y ait lieu à aucune visite sur bord ni à celui des bâtiments de son convoi. De Martens, Rec. vii. 175.

## APPENDIX VIII.

### DECLARATION OF PARIS.

THE Plenipotentiaries who signed the Treaty of Paris of the thirtieth of March, one thousand eight hundred and fifty-six, assembled in conference,

Considering :—

That maritime law in time of war has long been the subject of deplorable disputes ;

That the uncertainty of the law and of the duties in such a matter gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts; that it is consequently advantageous to establish a uniform doctrine on so important a point ;

That the Plenipotentiaries assembled in Congress at Paris cannot better respond to the intentions by which their governments are animated, than by seeking to introduce into international relations fixed principles in this respect.

The above-mentioned Plenipotentiaries, being duly authorised, resolved to concert among themselves as to the means of attaining this object ; and having come to an agreement, have adopted the following solemn declaration :—

1. Privateering is and remains abolished ;
2. The neutral flag covers enemy's goods, with the exception of contraband of war ;
3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag ;

4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The governments of the undersigned Plenipotentiaries engage to bring the present Declaration to the knowledge of the states which have not taken part in the Congress of Paris, and to invite them to accede to it.

Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned Plenipotentiaries doubt not that the efforts of their governments to obtain the general adoption thereof will be crowned with full success.

The present Declaration is not and shall not be binding, except between those powers who have acceded, or shall accede, to it.

Done at Paris, the sixteenth of April, one thousand eight hundred and fifty-six.

(Signed)      BUOL-SCHAUENSTEIN, &c.

## APPENDIX IX.

### BRITISH NEUTRALITY REGULATIONS, 1870.

#### *Neutrality Proclamation.*

WHEREAS We are happily at peace with all Sovereigns, Powers, and States;

And whereas, notwithstanding Our utmost exertions to preserve peace between all Sovereigns, Powers, and States, a state of war unhappily exists between His Imperial Majesty the Emperor of the French and His Majesty the King of Prussia, and between their respective subjects and others inhabiting within their countries, territories, or dominions;

And whereas We are on terms of friendship and amicable intercourse with each of these Sovereigns, and with their several subjects, and others inhabiting within their countries, territories, or dominions;

And whereas great numbers of Our loyal subjects reside and carry on commerce, and possess property and establishments, and enjoy various rights and privileges, within the dominions of each of the aforesaid Sovereigns, protected by the faith of Treaties between Us and each of the aforesaid Sovereigns;

And whereas We, being desirous of preserving to Our subjects the blessings of peace, which they now happily enjoy, are firmly purposed and determined to abstain altogether from taking any part, directly or indirectly, in the war now unhappily existing between the said Sovereigns, their



subjects and territories, and to remain at peace with, and to maintain a peaceful and friendly intercourse with each of them, and their respective subjects, and others inhabiting within any of their respective countries, territories, and dominions, and to maintain a strict and impartial neutrality in the said state of war, unhappily existing between them ;

We, therefore, have thought fit, by and with the advice of Our Privy Council, to issue this Our Royal Proclamation.

And We do hereby strictly charge and command all Our loving subjects to govern themselves accordingly, and to observe a strict neutrality in and during the aforesaid war, and to abstain from violating or contravening either the laws and statutes of the realm in this behalf, or the law of nations in relation thereto, as they will answer to the contrary at their peril.

And whereas in and by a certain statute made and passed in the fifty-ninth year of His Majesty King George the Third, entitled 'An Act to prevent the enlisting or engagement of His Majesty's subjects to serve in a foreign service, and the fitting out or equipping, in His Majesty's dominions, vessels for warlike purposes without His Majesty's license,' it is amongst other things declared and enacted as follows :—'That if any person within any part of the United Kingdom, or in any part of His Majesty's dominions beyond the seas, shall, without the leave and license of His Majesty, for that purpose first had and obtained as aforesaid, equip, furnish, fit out, or arm, or attempt or endeavour to equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out, or armed, or shall, knowingly, aid, assist, or be concerned in the equipping, furnishing, fitting out, or arming of any ship, or vessel, with intent or in order that such ship or vessel shall be employed in the service of any foreign Prince, State, or Potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising, or assuming to exercise any powers of government in or over any foreign state, colony,

province, or part of any province or people, as a transport or store-ship, or with intent to cruise or commit hostilities against any Prince, State, or Potentate, or against the subjects or citizens of any Prince, State, or Potentate, or against the persons exercising, or assuming to exercise, the powers of government in any colony, province, or part of any province or country, or against the inhabitant of any foreign colony, province, or part of any province or country, with whom His Majesty shall not then be at war, or shall, within the United Kingdom, or any of His Majesty's dominions, or in any settlement, colony, territory, island, or place, belonging or subject to His Majesty, issue or deliver any commission for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid, every such person so offending shall be deemed guilty of a misdemeanour, and shall, upon conviction thereof, upon any information or indictment, be punished by fine and imprisonment, or either of them, at the discretion of the Court in which such offender shall be convicted; and every such ship or vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores, which may belong to or be on board of any such ship or vessel, shall be forfeited; and it shall be lawful for any officer of His Majesty's Customs or Excise, or any officer of His Majesty's Navy, who is by law empowered to make seizures for any forfeiture incurred under any of the laws of Customs or Excise, or the laws of trade or navigation, to seize such ships and vessels aforesaid, and in such places and in such manner, in which the officers of His Majesty's Customs or Excise, and the officers of His Majesty's Navy, are empowered respectively to make seizures under the laws of Customs and Excise, or under the laws of trade and navigation; and that every such ship and vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores, which may belong to, or be on board of such ship or vessel, may be prosecuted and condemned in the like manner and in

such courts as ships or vessels may be prosecuted and condemned for any breach of the laws made for the protection of the Revenues of Customs and Excise, or of the laws of trade and navigation.'

And it is, in and by the said Act, further enacted, 'That if any person in any part of the United Kingdom of Great Britain and Ireland, or in any part of His Majesty's dominions beyond the seas, without the leave and license of His Majesty for that purpose first had and obtained as aforesaid, shall, by adding to the number of the guns of such vessel, or changing those on board for other guns, or by the addition of any equipment for war, increase or augment, or procure to be increased or augmented, or shall be knowingly concerned in increasing or augmenting, the warlike force of any ship or vessel of war, or cruizer, or other armed vessel, which, at the time of her arrival in any part of the United Kingdom, or any of His Majesty's dominions, was a ship of war, cruizer, or armed vessel, in the service of any foreign Prince, State, or Potentate, or of any person or persons exercising, or assuming to exercise, any powers of government in or over any colony, province, or part of any province or people belonging to the subjects of any such Prince, State, or Potentate, or to the inhabitants of any colony, province, or part of any province or country, under the control of any person or persons so exercising, or assuming to exercise, the powers of government, every such person so offending shall be deemed guilty of a misdemeanour, and shall, upon being convicted thereof, upon any information or indictment, be punished by fine and imprisonment, or either of them, at the discretion of the Court before which such offender shall be convicted.'

Now, in order that none of Our subjects may unwarily render themselves liable to the penalties imposed by the said statute, We do hereby strictly command that no person or persons whatsoever, do commit any act, matter, or thing

'soever contrary to the provisions of the said statute, upon

pain of the several penalties by the said statute imposed, and of Our high displeasure.

And we do hereby further warn and admonish all Our loving subjects, and all persons whatsoever entitled to our protection, to observe towards each of the aforesaid Sovereigns, their subjects and territories, and towards all belligerents whatsoever, with whom we are at peace, the duties of neutrality; and to respect, in all and each of them, the exercise of those belligerent rights which We and Our Royal Predecessors have always claimed to exercise.

And We do hereby further warn all Our loving subjects, and all persons whatsoever entitled to Our protection, that, if any of them shall presume in contempt of this Our Royal Proclamation, and of Our high displeasure, to do any acts in derogation of their duty as subjects of a neutral Sovereign, in a war between other Sovereigns, or in violation or contravention of the law of nations in that behalf, as more especially by breaking, or endeavouring to break, any blockade lawfully and actually established by or on behalf of either of the said Sovereigns, by carrying officers, soldiers, despatches, arms, ammunition, military stores or materials, or any article or articles considered and deemed to be contraband of war, according to the law or modern usages of nations, for the use or service of either of the said Sovereigns, that all persons so offending, together with their ships and goods, will rightfully incur, and be justly liable to, hostile capture, and to the penalties denounced by the law of nations in that behalf.

And We do hereby give notice, that all Our subjects and persons entitled to Our protection who may misconduct themselves in the premises, will do so at their peril and of their own wrong; and that they will in no wise obtain any protection from Us against such capture or such penalties as aforesaid, but will, on the contrary, incur Our high displeasure by such misconduct.

*Letter addressed by Earl Granville to the Lords  
Commissioners of the Admiralty.*

Foreign Office, July 19, 1870.

My Lords,—Her Majesty being fully determined to observe the duties of neutrality during the existing state of war between the Emperor of the French and the King of Prussia, and being moreover resolved to prevent, as far as possible, the use of Her Majesty's harbours, ports, and coasts, and the waters within Her Majesty's territorial jurisdiction, in aid of the warlike purposes of either belligerent, has commanded me to communicate to Your Lordships, for your guidance, the following rules, which are to be treated and enforced as Her Majesty's orders and directions:—

Her Majesty is pleased further to command that these rules shall be put in force in the United Kingdom, and in the Channel Islands, on and after the 26th of July instant, and in Her Majesty's territories and possessions beyond the seas, six days after the day when the Governor, or other chief authority, of each of such territories or possessions respectively, shall have notified and published the same; stating in such Notification that the said rules are to be obeyed by all persons within the same territories and possessions.

1. During the continuance of the present state of war, all ships of war of either belligerent are prohibited from making use of any port or roadstead in the United Kingdom of Great Britain and Ireland, or in the Channel Islands, or in any of Her Majesty's colonies or foreign possessions or dependencies, or of any waters subject to the territorial jurisdiction of the British Crown, as a station, or place of resort, for any warlike purpose, or for the purpose of obtaining any facilities of warlike equipment; and no ship of war of either belligerent shall hereafter be permitted to sail out of or leave any port, roadstead, or waters subject to British jurisdiction, from which any vessel of the other belligerent

(whether the same shall be a ship of war or a merchant-ship) shall have previously departed, until after the expiration of, at least, twenty-four hours from the departure of such last-mentioned vessel beyond the territorial jurisdiction of Her Majesty.

2. If any ship of war of either belligerent shall, after the time when this Order shall be first notified and put in force in the United Kingdom, and in the Channel Islands, and in the several colonies and foreign possessions and dependencies of Her Majesty respectively, enter any port, roadstead, or waters belonging to Her Majesty, either in the United Kingdom or in the Channel Islands, or in any of Her Majesty's colonies or foreign possessions or dependencies, such vessels shall be required to depart and to put to sea within twenty-four hours after her entrance into such port, roadstead, or waters, except in case of stress of weather, or of her requiring provisions or things necessary for the subsistence of her crew, or repairs; in either of which cases the authorities of the port, or of the nearest port (as the case may be), shall require her to put to sea as soon as possible after the expiration of such period of twenty-four hours, without permitting her to take in supplies beyond what may be necessary for her immediate use; and no such vessel which may have been allowed to remain within British waters for the purpose of repair shall continue in any such port, roadstead, or waters, for a longer period than twenty-four hours after her necessary repairs shall have been completed. Provided, nevertheless, that in all cases in which there shall be any vessel (whether ships of war or merchant-ships) of the said belligerent parties in the same port, roadstead, or waters within the territorial jurisdiction of Her Majesty, there shall be an interval of not less than twenty-four hours between the departure therefrom of any such vessel (whether ship of war or merchant-ship) of the one belligerent, and the subsequent departure therefrom of any ship of war of the other belligerent; and the time hereby limited for the departure of

such ships of war respectively shall always, in case of necessity, be extended so far as may be requisite for giving effect to this proviso, but no further or otherwise.

3. No ship of war of either belligerent shall hereafter be permitted, while in any port, roadstead, or waters subject to the territorial jurisdiction of Her Majesty, to take in any supplies, except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel to the nearest port of her own country, or to some nearer destination, and no coal shall again be supplied to any such ship of war in the same or any other port, roadstead, or waters subject to the territorial jurisdiction of Her Majesty, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within British waters as aforesaid.

4. Armed ships of either party are interdicted from carrying prizes made by them into the ports, harbours, roadsteads, or waters of the United Kingdom, or any of Her Majesty's colonies or possessions abroad.

I have, &c.,

GRANVILLE.

## APPENDIX X.

### BRITISH NAVAL PRIZE ACT, 1864.

WHEREAS it is expedient to enact permanently, with Amendments, such Provisions concerning Naval Prize, and Matters connected therewith, as have heretofore been usually passed at the Beginning of a War :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

#### *Preliminary.*

1. This Act may be cited as the Naval Prize Act, 1864.

2. In this Act—

The Term 'the Lords of the Admiralty' means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the Office of Lord High Admiral :

The Term 'the High Court of Admiralty' means the High Court of Admiralty of *England* :

The Term 'any of Her Majesty's Ships of War' includes any of Her Majesty's Vessels of War, and any hired armed Ship or Vessel in Her Majesty's Service :

The Term 'Officers and Crew' includes Flag Officers, Commanders, and other Officers, Engineers, Seamen, Marines, Soldiers, and others on board any of Her Majesty's Ships of War :



The Term 'Ship' includes Vessel and Boat, with the Tackle, Furniture, and Apparel of the Ship, Vessel, or Boat:

The Term 'Ship Papers' includes all Books, Passes, Sea Briefs, Charter Parties, Bills of Lading, Cockets, Letters, and other Documents and Writings delivered up or found on board a captured Ship:

The Term 'Goods' includes all such Things as are by the Course of Admiralty and Law of Nations the Subject of Adjudication as Prize (other than Ships).

#### I.—PRIZE COURTS.

3. The High Court of Admiralty, and every Court of Admiralty or of Vice-Admiralty, or other Court exercising Admiralty Jurisdiction in Her Majesty's Dominions, for the Time being authorised to take cognisance of and judicially proceed in Matters of Prize, shall be a Prize Court within the Meaning of this Act.

Every such Court, other than the High Court of Admiralty, is comprised in the Term 'Vice-Admiralty Prize Court,' when hereafter used in this Act.

##### *High Court of Admiralty.*

4. The High Court of Admiralty shall have Jurisdiction throughout Her Majesty's Dominions as a Prize Court.

The High Court of Admiralty as a Prize Court shall have Power to enforce any Order or Decree of a Vice-Admiralty Prize Court, and any Order or Decree of the Judicial Committee of the Privy Council in a Prize Appeal.

##### *Appeal; Judicial Committee.*

5. An Appeal shall lie to Her Majesty in Council from any Order or Decree of a Prize Court, as of Right in case of a Final Decree, and in other Cases with the Leave of the Court making the Order or Decree.

Every appeal shall be made in such Manner and Form and

subject to such Regulations (including Regulations as to Fees, Costs, Charges, and Expenses) as may for the Time being be directed by Order in Council, and in the Absence of any such Order, or so far as any such Order does not extend, then in such Manner and Form and subject to such Regulations as are for the Time being prescribed or in force respecting Maritime Causes of Appeal.

6. The Judicial Committee of the Privy Council shall have Jurisdiction to hear and report on any such Appeal, and may therein exercise all such Powers as for the time being appertain to them in respect of Appeals from any Court of Admiralty Jurisdiction, and all such Powers as are under this Act vested in the High Court of Admiralty, and all such Powers as were wont to be exercised by the Commissioners of Appeal in Prize Causes.

7. All Processes and Documents required for the Purposes of any such Appeal shall be transmitted to and shall remain in the Custody of the Registrar of Her Majesty in Prize Appeals.

8. In every such Appeal the usual Inhibition shall be extracted from the Registry of Her Majesty in Prize Appeals within Three Months after the Date of the Order or Decree appealed from if the Appeal be from the High Court of Admiralty, and within Six Months after that Date if it be from a Vice-Admiralty Prize Court.

The Judicial Committee may, nevertheless, on sufficient Cause shown, allow the Inhibition to be extracted and the Appeal to be prosecuted after the Expiration of the respective Periods aforesaid.

[N.B. Appeal now lies to the ordinary Courts of Appeal.]

#### *Vice-Admiralty Prize Courts.*

9. Every Vice-Admiralty Prize Court shall enforce within its Jurisdiction all Orders and Decrees of the Judicial Committee in Prize Appeals and of the High Court of Admiralty in Prize Causes.

10. Her Majesty in Council may grant to the Judge of any Vice-Admiralty Prize Court a Salary not exceeding Five hundred Pounds a Year, payable out of Money provided by Parliament, subject to such Regulations as seem meet.

A Judge to whom a Salary is so granted shall not be entitled to any further Emolument, arising from Fees or otherwise, in respect of Prize Business transacted in his Court.

An Account of all such Fees shall be kept by the Registrar of the Court, and the Amount thereof shall be carried to and form Part of the Consolidated Fund of the United Kingdom.

11. In accordance, as far as Circumstances admit, with the Principles and Regulations laid down in the Superannuation Act, 1859, Her Majesty in Council may grant to the Judge of any Vice-Admiralty Prize Court an annual or other Allowance, to take effect on the Termination of his Service, and to be payable out of Money provided by Parliament.

12. The Registrar of every Vice-Admiralty Prize Court shall, on the First Day of *January* and First Day of *July* in every Year, make out a Return (in such Form as the Lords of the Admiralty from Time to Time direct) of all Cases adjudged in the Court since the last half-yearly Return, and shall with all convenient Speed send the same to the Registrar of the High Court of Admiralty, who shall keep the same in the Registry of that Court, and who shall, as soon as conveniently may be, send a Copy of the Returns of each Half Year to the Lords of the Admiralty, who shall lay the same before both Houses of Parliament.

#### *General.*

13. The Judicial Committee of the Privy Council, with the Judge of the High Court of Admiralty, may from Time to Time frame General Orders for regulating (subject to the Provisions of this Act) the Procedure and Practice of Prize Courts, and the Duties and Conduct of the Officers thereof and of the Practitioners therein, and for regulating the Fees

to be taken by the Officers of the Courts, and the Costs, Charges, and Expenses to be allowed to the Practitioners therein.

Any such General Orders shall have full Effect, if and when approved by Her Majesty in Council, but not sooner or otherwise.

Every Order in Council made under this Section shall be laid before both Houses of Parliament.

Every such Order in Council shall be kept exhibited in a conspicuous Place in each Court to which it relates.

14. It shall not be lawful for any Registrar, Marshal, or other officer of any Prize Court, or for the Registrar of Her Majesty in Prize Appeals, directly or indirectly to act or be in any Manner concerned as Advocate, Proctor, Solicitor, or Agent, or otherwise, in any Prize Cause or Appeal, on pain of Dismissal or Suspension from Office, by Order of the Court or of the Judicial Committee (as the Case may require).

15. It shall not be lawful for any Proctor or Solicitor, or Person practising as a Proctor or Solicitor, being employed by a Party in a Prize Cause or Appeal, to be employed or concerned, by himself or his Partner, or by any other Person, directly or indirectly, by or on behalf of any adverse Party in that Cause or Appeal, on pain of Exclusion or Suspension from Practice in Prize Matters, by Order of the Court or of the Judicial Committee (as the Case may require).

## II.—PROCEDURE IN PRIZE CAUSES.

### *Proceedings by Captors.*

16. Every ship taken as Prize, and brought into Port within the Jurisdiction of a Prize Court, shall forthwith, and without Bulk broken, be delivered up to the Marshal of the Court.

If there is no such Marshal, then the Ship shall be in like Manner delivered up to the principal Officer of Customs at the Port.

The Ship shall remain in the Custody of the Marshal, or of such Officer, subject to the Orders of the Court.

17. The Captors shall, with all practical Speed after the Ship is brought into Port, bring the Ship Papers into the Registry of the Court.

The Officer in Command, or One of the Chief Officers of the capturing Ship, or some other Person who was present at the Capture, and saw the Ship Papers delivered up or found on board, shall make Oath that they are brought in as they were taken, without Fraud, Addition, Subduction, or Alteration, or else shall account on Oath to the Satisfaction of the Court for the Absence or altered Condition of the Ship Papers or any of them.

Where no Ship Papers are delivered up or found on board the captured Ship, the Officer in command, or One of the Chief Officers of the capturing Ship, or some other Person who was present at the Capture, shall make Oath to that Effect.

18. As soon as the Affidavit as to Ship Papers is filed, a Monition shall issue, returnable within Twenty Days from the Service thereof, citing all Persons in general to show Cause why the captured Ship should not be condemned.

19. The Captors shall, with all practical Speed after the captured Ship is brought into Port, bring Three or Four of the Principal Persons belonging to the captured Ship before the Judge of the Court or some Person authorised in this Behalf, by whom they shall be examined on Oath on the Standing Interrogatories.

The Preparatory Examinations on the Standing Interrogatories shall, if possible, be concluded within Five Days from the Commencement thereof.

20. After the Return of the Monition, the Court shall, on Production of the Preparatory Examinations and Ship Papers, proceed with all convenient Speed either to condemn or to release the captured Ship.

21. Where, on Production of the Preparatory Examinations

and Ship Papers, it appears to the Court doubtful whether the captured Ship is good Prize or not, the Court may direct further Proof to be adduced, either by Affidavit or by Examination of Witnesses, with or without Pleadings, or by Production of further Documents; and on such further Proof being adduced the Court shall with all convenient Speed proceed to Adjudication.

22. The foregoing Provisions, as far as they relate to the Custody of the Ship, and to Examination on the Standing Interrogatories, shall not apply to Ships of War taken as Prize.

*Claim.*

23. At any Time before Final Decree made in the Cause, any Person claiming an Interest in the Ship may enter in the Registry of the Court a Claim, verified on Oath.

Within Five Days after entering the Claim, the Claimant shall give Security for Costs in the sum of Sixty Pounds; but the Court shall have Power to enlarge the Time for giving Security, or to direct Security to be given in a larger Sum, if the Circumstances appear to require it.

*Appraisement.*

24. The Court may, if it thinks fit, at any Time direct that the captured Ship be appraised.

Every Appraisement shall be made by competent Persons sworn to make the same according to the best of their Skill and Knowledge.

*Delivery on Bail.*

25. After Appraisement, the Court may, if it thinks fit, direct that the captured Ship be delivered up to the Claimant, on his giving Security to the Satisfaction of the Court to pay to the Captors the appraised Value thereof in case of Condemnation.

*Sale.*

26. The Court may at any Time, if it thinks fit, on account of the Condition of the captured Ship, or on the Application

of a Claimant, order that the captured Ship be appraised as aforesaid (if not already appraised), and be sold.

27. On or after Condemnation the Court may, if it thinks fit, order that the Ship be appraised as aforesaid (if not already appraised), and be sold.

28. Every Sale shall be made by or under the Superintendence of the Marshal of the Court or of the Officer having the Custody of the captured Ship.

29. The Proceeds of any Sale, made either before or after Condemnation, and after Condemnation the appraised Value of the captured Ship, in case she has been delivered up to a Claimant on Bail, shall be paid under an Order of the Court either into the Bank of *England* to the Credit of Her Majesty's Paymaster General, or into the Hands of an Official Accountant (belonging to the Commissariat or some other Department) appointed for this Purpose by the Commissioners of Her Majesty's Treasury or by the Lords of the Admiralty, subject in either Case to such Regulations as may from Time to Time be made, by order in Council, as to the Custody and Disposal of Money so paid.

#### *Small armed Ships.*

30. The Captors may include in One Adjudication any Number, not exceeding Six, of armed Ships not exceeding One hundred Tons each, taken within Three Months next before Institution of Proceedings.

#### *Goods.*

31. The foregoing Provisions relating to Ships shall extend and apply, *mutatis mutandis*, to Goods taken as Prize on board Ship; and the Court may direct such Goods to be unladen, inventoried, and warehoused.

#### *Monition to Captors to Proceed.*

32. If the Captors fail to institute or to prosecute with Effect Proceedings for Adjudication, a Monition shall, on the Application of a Claimant, issue against the Captors, return-

able within Six Days from the Service thereof, citing them to appear and proceed to Adjudication ; and on the Return thereof the Court shall either forthwith proceed to Adjudication or direct further Proof to be adduced as aforesaid, and then proceed to Adjudication.

*Claim on Appeal.*

33. Where any Person, not an original Party in the Cause, intervenes on Appeal, he shall enter a Claim, verified on Oath, and shall give Security for Costs.

III.—SPECIAL CASES OF CAPTURE.

*Land Expeditions.*

34. Where in an Expedition of any of Her Majesty's Naval or Naval and Military Forces against a Fortress or Possession on Land, Goods belonging to the State of the Enemy or to a Public Trading Company of the Enemy exercising Powers of Government are taken in the Fortress or Possession, or a Ship is taken in Waters defended by or belonging to the Fortress or Possession, a Prize Court shall have Jurisdiction as to the Goods or Ship so taken, and any Goods taken on board the Ship, as in case of Prize.

*Conjunct Capture with Ally.*

35. Where any Ship or Goods is or are taken by any of Her Majesty's Naval or Naval and Military Forces while acting in conjunction with any Forces of any of Her Majesty's Allies, a Prize Court shall have Jurisdiction as to the same as in case of Prize, and shall have Power, after Condemnation, to apportion the due Share of the Proceeds to Her Majesty's Ally, the proportionate Amount and the Disposition of which Share shall be such as may from Time to Time be agreed between Her Majesty and Her Majesty's Ally.

*Joint Capture.*

36. Before Condemnation, a Petition on behalf of asserted



joint Captors shall not (except by special leave of the Court) be admitted, unless and until they give Security to the Satisfaction of the Court to contribute to the actual Captors a just Proportion of any Costs, Charges, or Expenses or Damages that may be incurred by or awarded against the actual Captors on account of the Capture and Detention of the Prize.

After Condemnation, such a Petition shall not (except by special Leave of the Court) be admitted unless and until the asserted joint Captors pay to the actual Captors a just Proportion of the Costs, Charges, and Expenses incurred by the actual Captors in the Case, and give such Security as aforesaid, and show sufficient Cause to the Court why their Petition was not presented before Condemnation.

Provided, that nothing in the present Section shall extend to the asserted Interest of a Flag Officer claiming to share by virtue of his Flag.

#### *Offences against Law of Prize.*

37. A Prize Court, on Proof of any Offence against the Law of Nations, or against this Act, or any Act relating to Naval Discipline, or against any Order in Council or Royal Proclamation, or of any Breach of Her Majesty's Instructions relating to Prize, or of any Act of Disobedience to the Orders of the Lords of the Admiralty, or to the Command of a Superior Officer, committed by the Captors in relation to any Ship or Goods taken as Prize, or in relation to any Person on board any such Ship, may, on Condemnation, reserve the Prize to Her Majesty's Disposal, notwithstanding any Grant that may have been made by Her Majesty in favour of Captors.

#### *Pre-emption.*

38. Where a Ship of a Foreign Nation passing the Seas laden with Naval or Victualling Stores intended to be carried to a Port of any Enemy of Her Majesty is taken and brought into a Port of the United Kingdom, and the Purchase for the

Service of Her Majesty of the Stores on board the Ship appears to the Lords of the Admiralty expedient without the Condemnation thereof in a Prize Court, in that Case the Lords of the Admiralty may purchase, on the Account or for the Service of Her Majesty, all or any of the Stores on board the Ship; and the Commissioners of Customs may permit the Stores purchased to be entered and landed within any Port.

*Capture by Ship other than a Ship of War.*

39. Any Ship or Goods taken as Prize by any of the Officers and Crew of a Ship other than a Ship of War of Her Majesty shall, on Condemnation, belong to Her Majesty in Her Office of Admiralty.

IV.—PRIZE SALVAGE.

40. Where any Ship or Goods belonging to any of Her Majesty's Subjects, after being taken as Prize by the Enemy, is or are retaken from the Enemy by any of Her Majesty's Ships of War, the same shall be restored by Decree of a Prize Court to the Owner, on his paying as Prize Salvage One Eighth Part of the Value of the Prize to be decreed and ascertained by the Court, or such Sum not exceeding One Eighth Part of the estimated Value of the Prize as may be agreed on between the Owner and the Re-captors, and approved by Order of the Court; Provided, that where the Re-capture is made under Circumstances of special Difficulty or Danger, the Prize Court may, if it thinks fit, award to the Re-captors as Prize Salvage a larger Part than One Eighth Part, but not exceeding in any Case One Fourth Part, of the Value of the Prize.

Provided also, that where a Ship after being so taken is set forth or used by any of Her Majesty's Enemies as a Ship of War, this Provision for Restitution shall not apply, and the Ship shall be adjudicated on as in other Cases of Prize.

41. Where a Ship belonging to any of Her Majesty's

Subjects, after being taken as Prize by the Enemy, is re-taken from the Enemy by any of Her Majesty's Ships of War, she may, with the Consent of the Re-captors, prosecute her Voyage, and it shall not be necessary for the Re-captors to proceed to Adjudication till her Return to a Port of the United Kingdom.

The Master or Owner, or his Agent, may, with the Consent of the Re-captors, unload and dispose of the Goods on board the Ship before Adjudication.

In case the Ship does not, within Six Months, return to a Port of the United Kingdom, the Re-captors may nevertheless institute Proceedings against the Ship or Goods in the High Court of Admiralty, and the Court may thereupon award Prize Salvage as aforesaid to the Re-captors, and may enforce Payment thereof, either by Warrant of Arrest against the Ship or Goods, or by Monition and Attachment against the Owner.

\* \* \* \* \*

## VI.—MISCELLANEOUS PROVISIONS.

### *Ransom.*

45. Her Majesty in Council may from Time to Time, in relation to any War, make such Orders as may seem expedient, according to Circumstances, for prohibiting or allowing, wholly or in certain Cases, or subject to any Conditions or Regulations or otherwise, as may from Time to Time seem meet, the ransoming or the entering into any Contract or Agreement for the ransoming of any Ship or Goods belonging to any of Her Majesty's Subjects, and taken as Prize by any of Her Majesty's Enemies.

Any Contract or Agreement entered into, and any Bill, Bond, or other Security given for Ransom of any Ship or Goods, shall be under the exclusive Jurisdiction of the High Court of Admiralty as a Prize Court (subject to Appeal to the Judicial Committee of the Privy Council), and if entered into or given in contravention of any such Order in Council

shall be deemed to have been entered into or given for an illegal Consideration.

If any person ransoms or enters into any Contract or Agreement for ransoming any Ship or Goods, in contravention of any such Order in Council, he shall for every such Offence be liable to be proceeded against in the High Court of Admiralty at the suit of Her Majesty in Her Office of Admiralty, and on Conviction to be fined, in the Discretion of the Court, any Sum not exceeding Five hundred Pounds.

*Convoy.*

46. If the Master or other Person having the Command of any Ship of any of Her Majesty's Subjects, under the Convoy of any of Her Majesty's Ships of War, wilfully disobeys any lawful Signal, Instruction, or Command of the Commander of the Convoy, or without Leave deserts the Convoy, he shall be liable to be proceeded against in the High Court of Admiralty at the Suit of Her Majesty in Her Office of Admiralty, and upon Conviction to be fined, in the Discretion of the Court, any Sum not exceeding Five hundred Pounds, and to suffer Imprisonment for such Time, not exceeding One Year, as the Court may adjudge.

\* \* \* \* \*

*Perjury.*

50. If any Person wilfully and corruptly swears, declares, or affirms falsely in any Prize Cause or Appeal, or in any Proceeding under this Act, or in respect of any Matter required by this Act to be verified on Oath, or suborns any other Person to do so, he shall be deemed guilty of Perjury, or of Subornation of Perjury (as the Case may be), and shall be liable to be punished accordingly.

*Limitation of Actions, &c.*

51. Any Action or Proceeding shall not lie in any Part of Her Majesty's Dominions against any Person acting under the Authority or in the Execution or intended Execution or

in pursuance of this Act for any alleged Irregularity or Trespass, or other Act or Thing done or omitted by him under this Act, unless Notice in Writing (specifying the Cause of the Action or Proceeding) is given by the intending Plaintiff or Prosecutor to the intended Defendant One Month at least before the Commencement of the Action or Proceeding, nor unless the Action or Proceeding is commenced within Six Months next after the Act or Thing complained of is done or omitted, or, in case of a Continuation of Damage, within Six Months next after the doing of such Damage has ceased.

In any such Action the Defendant may plead generally that the Act or Thing complained of was done or omitted by him when acting under the Authority or in the Execution or intended Execution or in pursuance of this Act, and may give all special Matter in Evidence; and the Plaintiff shall not succeed if Tender of sufficient Amends is made by the Defendant before the Commencement of the Action; and in case no Tender has been made, the Defendant may, by Leave of the Court in which the Action is brought, at any Time pay into Court such Sum of Money as he thinks fit, whereupon such Proceeding and Order shall be had and made in and by the Court as may be had and made on the Payment of Money into Court in an ordinary Action; and if the Plaintiff does not succeed in the Action, the Defendant shall receive such full and reasonable Indemnity as to all Costs, Charges, and Expenses incurred in and about the Action as may be taxed and allowed by the proper Officer, subject to Review; and though a Verdict is given for the Plaintiff in the Action he shall not have Costs against the Defendant, unless the Judge before whom the Trial is had certifies his Approval of the Action.

Any such Action or Proceeding against any Person in Her Majesty's Naval Service, or in the Employment of the Lords of the Admiralty, shall not be brought or instituted elsewhere than in the United Kingdom.

*Petitions of Right.*

52. A Petition of Right, under The Petitions of Right Act, 1860, may, if the Suppliant thinks fit, be intituled in the High Court of Admiralty, in case the Subject Matter of the Petition or any material Part thereof arises out of the Exercise of any Belligerent Right on behalf of the Crown, or would be cognisable in a Prize Court within Her Majesty's Dominions if the same were a Matter in dispute between private Persons.

Any Petition of Right under the last-mentioned Act, whether intituled in the High Court of Admiralty or not, may be prosecuted in that Court, if the Lord Chancellor thinks fit so to direct.

The Provisions of this Act relative to Appeal, and to the framing and Approval of General Orders for regulating the Procedure and Practice of the High Court of Admiralty, shall extend to the Case of any such Petition of Right intituled or directed to be prosecuted in that Court; and, subject thereto, all the Provisions of The Petitions of Right Act, 1860, shall apply, *mutatis mutandis*, in the Case of any such Petition of Right; and for the Purposes of the present Section the Terms 'Court' and 'Judge' in that Act shall respectively be understood to include and to mean the High Court of Admiralty and the Judge thereof, and other Terms shall have the respective Meanings given to them in that Act.

*Orders in Council.*

53. Her Majesty in Council may from Time to Time make such Orders in Council as seem meet for the better Execution of this Act.

54. Every Order in Council under this Act shall be published in the *London Gazette*, and shall be laid before both Houses of Parliament within Thirty Days after the making thereof, if Parliament is then sitting, and, if not, then within Thirty Days after the next Meeting of Parliament.

*Savings.*

55. Nothing in this Act shall—

- (1.) give to the Officers and Crew of any of Her Majesty's Ships of War any Right or Claim in or to any Ship or Goods taken as Prize or the Proceeds thereof, it being the Intent of this Act that such Officers and Crews shall continue to take only such Interest (if any) in the Proceeds of Prizes as may be from Time to Time granted to them by the Crown; or
- (2.) affect the Operation of any existing Treaty or Convention with any Foreign Power; or
- (3.) take away or abridge the Power of the Crown to enter into any Treaty or Convention with any Foreign Power containing any Stipulation that may seem meet concerning any Matter to which this Act relates; or
- (4.) take away, abridge, or control, further or otherwise than as expressly provided by this Act, any Right, Power, or Prerogative of Her Majesty the Queen in right of Her Crown, or in right of Her Office of Admiralty, or any Right or Power of the Lord High Admiral of the United Kingdom, or of the Commissioners for executing the Office of Lord High Admiral; or
- (5.) take away, abridge, or control, further or otherwise than as expressly provided by this Act, the Jurisdiction or Authority of a Prize Court to take cognizance of and judicially proceed upon any Capture, Seizure, Prize, or Reprisal of any Ship or Goods, and to hear and determine the same, and, according to the Course of Admiralty and the Law of Nations, to adjudge and condemn any Ship or Goods, or any other Jurisdiction or Authority of or exerciseable by a Prize Court.

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